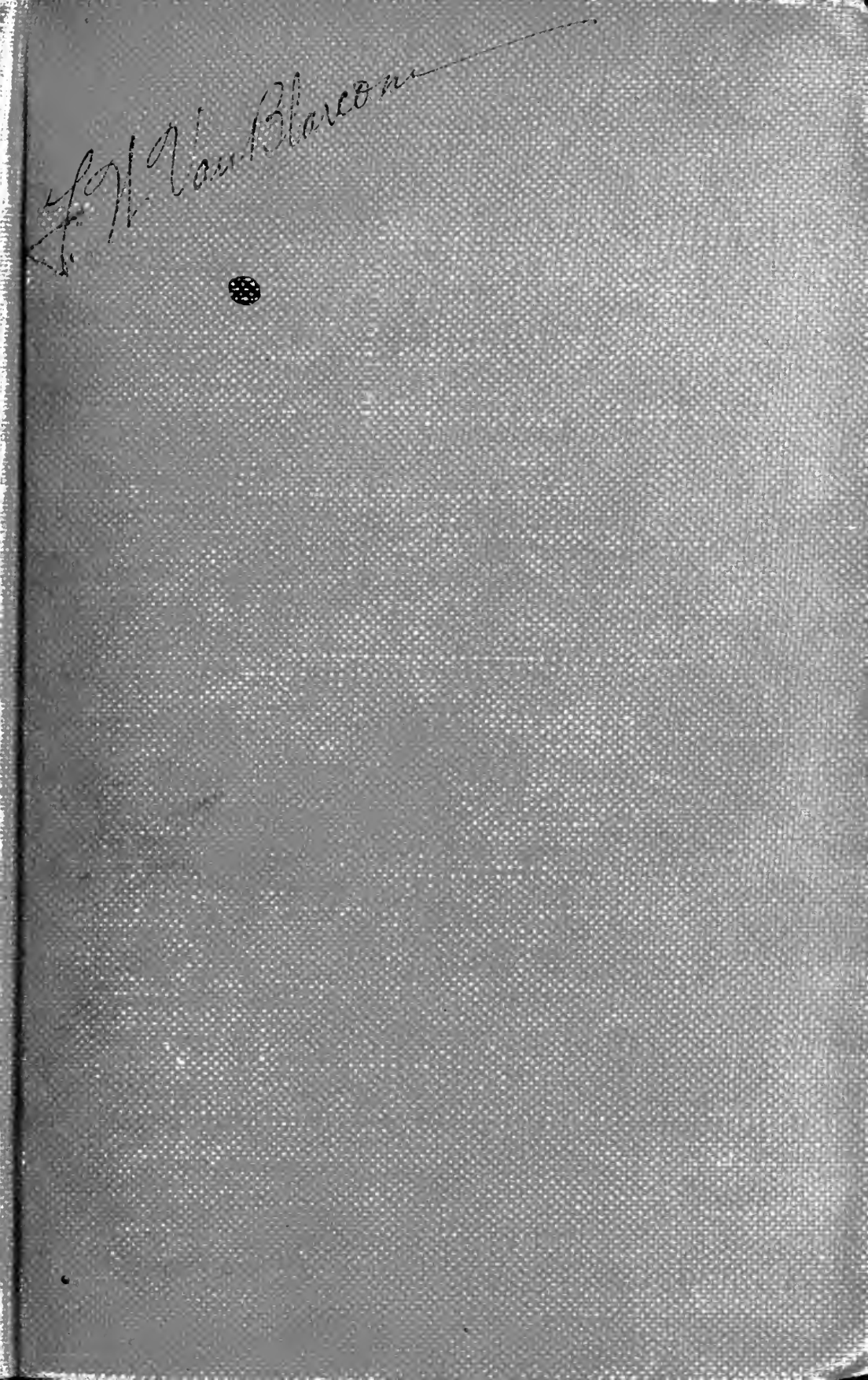

THE MECHANICS LIEN LAW OF NEW JERSEY

CONTAINING

THE REVISION OF 1898 AND ALL SUPPLEMENTS AND AMENDMENTS THERETO, WITH NOTES OF DECISIONS, AND A COLLECTION OF FORMS; ALSO THE MUNICIPAL IMPROVEMENTS LIEN ACT OF 1892, WITH NOTES.

SECOND EDITION.

BY

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NEWARK, N. J.
SONEY & SAGE.
1910.

PREFACE.

In the present work the writer has included the text of the Mechanics' Lien Act, as revised in 1898, with its subsequent supplements and amendments, and also the amended text of the act of 1892, which he has styled the Municipal Improvements Lien Act. He has also essayed to present, in an introductory chapter, an historical summary of the various acts passed by the legislature of New Jersey, relating to building liens, from the earliest act of 1820 to the present time. In doing this he has set out, quite fully, the text of these various earlier acts; so fully, it is believed, that the practitioner will have, in this one manual, a substantially complete apparatus; and will rarely need to turn to the original session laws.

In preparing the notes, he has tried to collect all the decisions, and to refer to them on each point that they either decide or discuss. In doing this he has aimed usually to state somewhat fully what they decide or discuss, in lieu of a bare reference to them. In some instances, he has also ventured to comment upon certain of the decisions. He has tried to make this second essay a distinct improvement upon his first attempt; and trusts that it will be found that he has measurably succeeded in that endeavor, and has thus properly shown his appreciation of the favor accorded to that previous work.

In some respects the present text of the Mechanics' Lien Act, and much more that of the Municipal Improvements Act, might very properly be amended. In the case of the former, what is needed is re-editing, rather than any substantial change in its provisions; and in the case of both, no changes should be made unless they are approved by counsel familiar with the previous course of judicial decision upon the subject.

In preparing this edition all acts of the legislature, including those of the present session (1910), have been covered. For decisions, the Atlantic Reporter has been exam-

ined through volume 75; the Law Reports through 47 Vroom; the Equity Reports through 3 Buch. and the Law Journal through Volume 31.

The legislation of 1910 has been incorporated in the work by way of addition to the text and notes, as they were prepared before those enactments were passed. This course has been pursued, as the one most likely to prove convenient and useful.

In citing cases, I have usually referred to the official reports, but in some instances the reference is to the Atlantic Reporter, instead. Wherever such a case has been published in the official reports, its citation thereto will be found to be given in the table of cases at the end of this book.

August 15, 1910. EDWARD J. LUCE.

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CHAPTER I.

Historical Summary of the Legislation on the Subject of Building Liens.

(1)

HISTORICAL SUMMARY OF BUILDING LIEN LEGISLATION.

As is pointed out by Vice Chancellor Stevenson, in his valuable opinion in *McNab, etc., Co. v. Paterson Bld. Co. et al.,* 1 Buch. 133, the legislation, in the State of New Jersey, on the subject of Mechanics' Liens, begins with the act of February 25, 1820 (1820, p. 124).

In the same opinion, the Vice Chancellor notes that the first Mechanics Lien Law ever enacted in this country was the Maryland Statute (1791, c. 45, ¶ X.); that it concerned only "the territory of Columbia and the City of Washington," and was enacted "for the encouragement of master builders to undertake the building" of houses in the projected City of Washington; and that the lien, given by it, was given only to those to whom the owner of the property, subject to the lien, was indebted.

He further notes that the next statute on the subject, the Pennsylvania act (1803, p. 591), gave the lien only to those to whom the owner of the property was indebted; but was shortly afterward followed by an act (1806, p. 480), narrow in its territorial scope (the City of Philadelphia), which undertook to give a lien to claimants to whom the owner was not himself indebted.

He then says: "Here we have the origin of the lien which is charged upon the property of one man to pay another man's debts. This is the statute which first imposed upon the owners of real estate, who desire to improve their property, and to make contracts for the erection of buildings thereon, the onerous task of discovering who the creditors of their contractors are, and then seeing that their claims are satisfied so far as they have arisen from the furnishing of labor or material to the erection of the owners' buildings." Contrasting this sort of a lien with that given by the earliest acts, he says: "The first lien, the elemental mechanic's lien,

is little more than an extension of the common law lien afforded to large numbers of purveyors of labor and materials who add value to chattels under contract with the owner thereof. The second lien, arbitrarily granted to the contractor or materialman between whom and the owner there is no privity whatever, so far as I am aware, has no analogy in the common law, and stands in many respects, directly in conflict with fundamental principles of justice. There are grounds for claiming, as recited in the original Maryland statute of 1791, that a mechanic's lien, for the protection of the party with whom the owner of the building contracts, encourages the erection of buildings, but it would seem that the extension of this lien to the protection of the creditors of the party with whom the owner contracts, must often have the effect to discourage the erection of buildings."

Again at p. 139, the Vice Chancellor, points out another obvious distinction, between a lien given to a wage earner and one given to a material man or an employer of laborers. He says: "The general policy of the law may be considered to favor and prefer the claims of all wage earners, whether on sea or land; — — — — but there is no principle of law, and no general policy or theory recognized by law, apart from the mechanics lien statutes, which specially favors the collection of debts due to contractors and merchants merely because such debts have been created in the erection of buildings whose owners are not liable for such debts."

These observations of Vice Chancellor Stevenson are a most useful preface to the review of the legislation in this State on the subject of mechanics liens to which we now address ourselves.

The act of February 25, 1820 (1820, p. 124), as has been said, was the first statute on the subject passed in this State. Omitting parts not here essential, that act was as follows:

"AN ACT securing to mechanics and others, payment for their labor and materials in erecting any house or other building within the limits therein mentioned.

"*Whereas* Edward Sharp, Esquire, of Camden, in the County of Gloucester, has by his memorial represented to the legislature, that he is about to lay off and divide into building lots, and as soon as may be, sell and dispose of the same, a certain tract of land now owned by him, in and

adjoining to the town of Camden aforesaid, bounded and described as follows, to wit (here follows a long description of the lands):

"*And whereas* The said Edward Sharp hath further represented that it would greatly encourage the erection of buildings on the said lots so to be laid off and divided as aforesaid, and thereby more speedily enlarge and improve the said town of Camden, to secure by law to mechanics and others, payment for their labor and materials in erecting any building upon the said tract of land; all which appearing to be just and reasonable,

SEC. 1. BE IT ENACTED *by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That *all and every dwellinghouse or other building* hereafter constructed and erected within the tract of land above described, shall be subject to the payments of the debts contracted for or by reason of any work done or materials found, and provided by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, ironmonger, blacksmith, plasterer and lumber merchant, or any other person or persons employed in furnishing materials for or in the erecting and constructing such house or other building; but if such house or other building should not sell for a sum of money sufficient to pay all the demands for work and materials, then and in such case, the same shall be averaged and each of the creditors paid a sum proportioned to their several demands: *provided always,* that no such debt for work and materials shall remain *a lien on the said houses or other buildings* longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted, or the claim filed, within six months after performing the work or furnishing the materials, in the office of the clerk of the inferior court of common pleas of the said county of Gloucester: *and provided also,* that each and every person having received satisfaction for his or their debt, for which a claim shall be filed, or action brought as aforesaid, shall at the request of any person interested in the building on which the same was a lien, or in having the same lien removed, or of his, her or their legal representatives on payment of the costs of the claim or action, and on tender of the costs of office for entering the satisfaction, within six days after

such request made, enter satisfaction of the claim in the office of the clerk of the court where such claim shall be filed or such action brought, which shall forever thereafter discharge, defeat and release the same: and if such person, having received such satisfaction as aforesaid, by himself, or his attorney, shall not within six days after request and payment of the costs of the claim or action as aforesaid, and tender as aforesaid, by himself or his attorney duly authorized, enter satisfaction as aforesaid, he, she or they neglecting or refusing so to do, shall forfeit and pay unto the party or parties aggrieved, any sum of money not exceeding one-half of the debt for which the claim was filed, or action brought as aforesaid, to be sued for and recovered by the person or persons injured, in like manner as debts are now recoverable by the laws of this state.

Sec. 2. *And be it enacted,* That in all cases of lien created by this act, the person having a claim filed agreeably to the provisions hereof, may at his election proceed to recover it by personal action, according to the nature of the demand against the debtor, his executors or administrators, or by scire facias against the debtor, and owner or owners of the building, or their executors or administrators; and where the proceeding is by scire facias, the writ shall be served in like manner as a summons, upon the person or persons named therein, if they can be found within the said county of Gloucester, or are residents therein; or if they cannot be found or are not resident in said county, by fixing a copy of the writ on the door of the building against which the claim is filed, and upon the return of service and failure of the defendant or defendants to appear, the court shall render judgment, as in other cases upon writs of scire facias; but if they or either of them appear, such person or persons may plead and make defense, and the like proceedings be had as in personal actions for the recovery of debts: *provided,* that no judgment rendered on any such writ of scire facias, shall warrant the issuing of an execution *except against the building or buildings* upon which the lien existed as aforesaid.

Sec. 3. *And be it enacted,* That every claim to be filed as aforesaid, shall particularly designate the building for which the work therein to be mentioned was done, or the materials therein to be mentioned were found and provided.

Sec. 4. *And be it enacted,* That whenever, within the tract of land above described, any building shall be erected by contract, then and in such case, payment according to such contract, by the owner or owners of the building to the contractor or contractors, shall fully and entirely discharge such building from all lien for work done, and materials furnished: *provided,* the said contract shall be in writing and filed as aforesaid forthwith after the same shall have been made and executed."

The noticeable features of this first statute are:

1. It was passed at the request of the land owner.
2. *It gave no lien on the lands,* but made the buildings only liable thereto.
3. It gave the lien to persons between whom and the owner there might be no privity.
4. It enabled the owner, however, by filing his contract, and paying according to its terms, to free the building from the lien of any one to whom he was not himself debtor (§4.)

By the act of February 19, 1830 (p. 103), the act of 1820 was extended to the territorial limits of the city of Camden. It became known thereafter as the "Camden Lien Law." This act of 1830, in §2, repealed the fourth section of the act of 1820 (the section which permitted the owner to file his contract, etc.). The act of 1830 contained no other provisions of consequence.

By the act of March 7, 1844 (p. 177), the second section of the act of 1830 (p. 103) was repealed, and the fourth section of the act of 1820 was thus revived. The act of 1844 contained no other provisions of present moment.

By the act of 1846, p. 4; the act of 1846, p. 171; and the act of 1847, p. 56; the act of 1820 was amended in particulars of no present moment. It was never, by any act extended in its application beyond the territory of the city of Camden.

By the act of 1852, p. 31, § 2 (February 12), the act of 1820, and all its supplements, were repealed, viz.:

1820 p. 124. Approved February 25.
1830, p. 103. Approved February 19.
1844, p. 177. Approved March 7.
1846, p. 4. Approved January 29.
1846, p. 171. Approved April 17.
1847, p. 56. Approved February 4.

While the Camden lien law was thus running its course, another series of acts also came into existence. The first of these was **the act of March 3, 1835 (1835, p. 148).** That act read as follows:

AN ACT securing to mechanics, and others, payment for their labor and materials in erecting any house, or other building, within the limits therein mentioned.

"Sec. 1. BE IT ENACTED *by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same,* That all and every dwelling-house or other building, hereafter constructed and erected, within the limits of the township of Trenton, in the county of Hunterdon, and Nottingham, in the county of Burlington, in this state, shall be subject to the payment of the debts contracted for, or by reason of any work done, or materials found and provided by any brickmaker, bricklayer, stone cutter, mason, lime-merchant, carpenter, painter and glazier, iron-monger, blacksmith, plasterer, and lumber-merchant, or any other person or persons employed, or furnishing materials for, or in the erection and constructing such house or other building: but if such house or other building should not sell for a sum of money sufficient to pay all the demands, for work and materials, over and above any prior claim or mortgage or judgment against any land owner, on the land on which said building or buildings may be erected, and prior to the erection of said building, or buildings, then, and in such case, the same shall be averaged, and each of the creditors paid a sum proportioned to their several demands; *provided always* that no such debt for work and materials shall remain a lien on the said houses or other buildings longer than two years from the commencement of the building thereof; unless the claim be filed within six months after performing the work or furnishing the materials, in the office of the clerk of the inferior court of common pleas of the county where such building may be erected, as the case may be, and an action for the recovery of the same be instituted within one year after such work done, or materials found; and all claims for work done, and materials furnished, shall be filed within six months from the time that the materials were furnished and the work done, or be forever barred and excluded from the provisions and benefits of this act; *and provided also,* that each and every person having received satisfaction for his or their debt, for which a claim shall be filed as aforesaid, or action brought as aforesaid, shall thereupon execute a release and discharge for the same, expressing therein the date of the entry of said lien

in the clerk's office, of the county where such building is erected, and the amount thereof, and acknowledge the same before a judge of the inferior court of common pleas of the county where the same may be filed, which shall be sufficient authority for the clerk to enter satisfaction to the same, upon payment of costs.

Sec. 2. *And be it enacted,* That in all cases of lien created by this act, the person having a claim filed agreeably to the provisions hereof, may, at his election, proceed to recover it by personal action, according to the nature of the demand, against the debtor, his executors or administrators, or by scire facias against the debtor and owner or owners of the building, or their executors or administrators; and where the proceeding is by scire facias the writ shall be served in like manner as a summons, upon the person or persons named therein, if they can be found within any of the said counties where such building is erected, or are resident therein; or if they cannot be found, or are not resident in either of said counties, by affixing a copy of the writ on the door of the building against which the claim is filed, and upon the return of service and failure of the defendant or defendants to appear, the court shall render judgment, as in other cases upon writs of scire facias; but if they, or either of them appear, such person or persons may plead and make defence, and the like proceedings be had as in personal actions for the recovery of debts; and upon judgment being rendered thereupon, execution shall issue *against the building or buildings and land* upon which the same is erected, subject to all prior claims as aforesaid.

Sec. 3. *And be it enacted,* That whenever any master or workman shall refuse to pay to any journeyman or laborer, employed by him, in the erection or construting any house or other building, his wages, it shall be the duty of such journeyman or laborer, to give notice, in writing, to the owner or owners of such house or other building, of such refusal, and the amount due him or them, and so demanded, and the said owner or owners shall thereupon be authorized to retain the amount so due and claimed, by any such journeyman and laborer, out of the amount due by him or them to such master workman, and give notice to such master workman of such notice and demand, and if not liquidated and paid by such master workman, such owner or owners,

on being satisfied of the correctness of such demand, shall pay the same; and the receipt of such journeyman and laborer for the same, shall be a sufficient offset in the settlement of the accounts between such owner or owners of any house or other building, and such master workman.

Sec. 4. *And be it enacted,* That every claim to be filed as aforesaid, shall particularly designate the building for which the work therein to be mentioned, was done, or the materials, therein to be mentioned were found; *and provided always,* that the provisions of this law shall not extend to or include repairs done by any tenant on property rented by him, without the written consent of the owner thereof, that the same may be brought within the provisions of this act.

Sec. 5. *And be it enacted,* That whenever within any of the said townships, before named, any building shall be erected by contract, then, and in such case, payment according to such contract, by the owner or owners of the building, to the contractor or contractors, shall fully and entirely discharge such building from all lien, for work done and materials furnished; *provided,* the said contract be in writing, and filed as aforesaid, within sixty days after the same shall have been made and executed."

The noticeable features of this act are:

1. Its territorial limit was the township of Trenton.

2. It gave the lien *against the land* as well as against the building.

3. Like the Camden act, it gave a lien to persons not in privity with the owner; but enabled the owner to escape such liens by filing his contract, etc.

4. Its most remarkable feature is its third section, which gives a claimant journeyman or laborer a right of recourse against the contract price in the owners' hands by stop notice.

This act of 1835 (p. 148) was followed by a number of acts extending its territorial scope, but not in any other way modifying its provisions. These acts and the extension effected by each are as follows:

1836, p. 280. Approved March 7, Hunterdon county.

1837, p. 430. Approved March 10, the county of Somerset and the township of West Windsor, in Middlesex county, and the township of Paterson and Manchester, in Passaic county.

1839, p. 170. Approved March 8, the township of Chesterfield, in Burlington county.

1842, p. 24, February 7, the corporation of Jersey City and the townships of Van Vorst and Bergen, in Hudson county.

1843, p. 75, February 20, the City of Burlington.

1844, p. 178, March 13, the counties of Monmouth, Salem and

Cumberland, and the township of Acquackanonck, in Passaic county.

1844, p. 221, March 7, the town of Mount Holly, and one mile from the Court House therein, also the township of Northampton, in Burlington county.

By the act of April 3, 1845 (p. 215), it was enacted as follows:

"A FURTHER SUPPLEMENT to the act entitled, "An act securing to mechanics and others payment for their labour and materials, in erecting any house or other building within the limits therein mentioned," passed March third, eighteen hundred and thirty-five, and to the several supplements to said act.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey,* as follows:

Sec. 1. The lien given by the act to which this is a supplement, and by the several supplements to said act, is hereby declared to extend to all mills and manufactories of every description, for all debts contracted by the owner or owners thereof, or by any other person, with his, her, or their consent in writing, for machinery or fixtures furnished for said mill or manufactory, or work done and materials furnished for or about the erection, construction, or repairing machinery in the same.

Sec. 2. This act shall be limited in its operation to the county of Mercer."

All of the foregoing acts were embodied in the Revision of April 15, 1846; R. S., p. 732, §§ 1-7, and

By the act of February 22, 1849 (p. 86), the provisions of that revision were extended to the lower township in Cape May county;

By the act of February 15, 1850 (p. 71), they were extended to the county of Morris, and the township of East Windsor in Mercer county and the townships of Mansfield and Chester, in Burlington county; and

By the act of March 7, 1851 (p. 187), they were extended to all the counties of the state, and the time for filing claim was lengthened to a year.

All of these acts were repealed by the act of 1853, p. 437, § 17, viz.:

1835, p. 148. Approved March 3;
1836. p. 280. Approved March 7;
1837, p. 430. Approved March 10;
1839, p. 170. Approved March 8;
1842, p. 24. Approved February 7;
1843, p. 75. Approved February 20;

1844, p. 178. Approved March 13;
1844, p. 221. Approved March 7;
1845, p. 215. Approved April 3;
Rev. April 15, 1846; R. S., p. 792, §§ 1-7;
1849, p. 86. Approved February 22;
1850, p. 71. Approved February 15;
1851, p. 187. Approved March 7.

Besides the Camden act of 1820 and the Trenton act of 1835, there was a third act, which may be called **the Newark act, passed February 16, 1847 (p. 57),** which was as follows:

"AN ACT for the better security of mechanics and others erecting buildings, and furnishing materials therefor.

"1. *Be it enacted by the Senate and General Assembly of the State of New Jersey,* That any person who shall hereafter, by virtue of any contract with the owner thereof, or his agent, or any person who, in pursuance of an agreement with any such contractor shall, in conformity with the terms of the contract with such owner or agent, perform any labour, or furnish materials in building, altering, or repairing any house or other building, or appurtenances to any house or other building, in the city of Newark, in the townships of Elizabeth and Rahway, in the county of Essex, and the townships of Woodbridge and South Brunswick, in the county of Middlesex, shall have a lien for the value of such labour and materials upon such house or building and appurtenances, and upon the lot of land on which the same stands, to the extent of the right, title, and interest, at the time existing, of such owner, in the manner and to the extent hereinafter mentioned; but the aggregate of all the liens authorized by this act to be created, for the labour performed and materials furnished in building, altering or repairing any house or other building or appurtenances, shall not exceed the price stipulated in the contract with such owner, or his agent, to be paid therefor; and such owner shall not be obliged to pay for or on account of such house, building, or appurtenances, any greater sum in amount, or at a different time, than the price so stipulated and agreed to be paid therefor, in and by such contract; and if the aggregate of liens shall exceed such sum or amount, the same shall be applied to the proportion of the amount of the several liens.

2. *And be it enacted,* That the person performing such

labour or furnishing such materials shall cause to be drawn up specifications of the work by him contracted to be performed, or materials to be furnished, and stating the price or prices agreed to be paid therefor, and shall file them, or if there be a contract, a true copy thereof, if the same be in writing, in the office of the clerk of the county in which the lien is created, and serve a notice thereof, personally, on such owner, or his said agent, within fifteen days after the making of such contract, or after commencing such labour or the furnishing said materials; the said clerks shall provide and keep a book which shall be called "The Mechanics' and Labourers' Lien Book," in which they shall enter, alphabetically, the names of the owners, and, opposite to them, the names of contractors or labourers, or other person claiming a lien, and the lot and street on which such work is to be done, or materials furnished, at the time of filing such specification or a copy of such contract; and if the said specification or copy of contract shall not be filed, and notice served as above provided, the said lien, and all claim thereby, shall be forever barred and excluded from the benefits of this act; the said clerks shall receive for their services required by this section, the sum of eighteen cents.

"3. *And be it enacted,* That the lien, so created by this act, shall take effect from such filing and such service of the said notice, and shall continue in full force for the space of six months after the completion of said building, unless discharged, as hereinafter provided; and such lien may be discharged on such docket at any time by said clerk, on the production to, and filing with him of a certificate, signed by the contractor or laborer, or other person claiming such lien, that the claim for which such lien was created is satisfied and discharged; which certificate shall be acknowledged or proved in the same manner as deeds are required to be acknowledged or proved, to entitle the same to be recorded, and upon paying the clerk the same fees as for filing other papers and entering satisfaction of judgments.

"4. *And be it enacted,* That any contractor or labourer, or any person furnishing materials, in pursuance of any contract made by such contractor with such owner, or his agent therefor, or any person in whose favour a lien has been created by this act, after such labour has been performed, or materials furnished, and payment for the same has became

due, and the said owner, after demand made, shall refuse to pay the same, may enforce or bring such lien to a close, by action or suit at law, in any court of competent jurisdiction in the county in which the lien is created; and if the sum claimed shall be one hundred dollars, or under, the action shall be in the court for the trial of small causes, before any justice of the peace in said city, or in the townships, respectively, in which the lien is created; and the suits shall be conducted, and like proceeding had, in all respects, as in other cases; and if the action shall be for a sum exceeding one hundred dollars, it may be prosecuted, as in other cases, to judgment and execution, and a sale made of the house or building and appurtenances, and lot of land, on which the lien was created, as in other cases of sale of land by virtue of judgment and execution; and if judgment shall be recovered in the court for the trial of small causes, and no appeal be demanded, or other proceedings had upon said judgment, the party recovering may file a transcript of said judgment, under the hand and seal of the said justice, in the office of the clerk of said county, with an affidavit of the claimant, that the said judgment is unsatisfied; and thereupon, the said clerk shall docket and record the said judgment, as in other cases, and execution may issue thereon; and the said judgment and execution shall have the same force and effect as in other cases, and the said house or other building, and lot of land, upon which the same is a lien, may be sold, as is provided for the sale of land upon judgment and execution; but no priority shall be given to such judgment and execution over other liens, but the said house or building and appurtenances, and lot of land, or the avails thereof, over and above all prior encumbrances, if any, shall be for the equal benefit of all persons who have obtained a lien, and have a just and legal claim thereon by virtue of this act, in the proportions mentioned in the first section thereof; but nothing in this act contained shall authorize the claimant to recover or receive any greater sum or amount than he is justly and by law entitled to, and the like costs and fees, as near as may be, shall be recovered, as in other cases, in the said several courts.

5. *And be it enacted.* That if any dispute shall arise between the parties in whose favor a lien is created by this act, as to the amount which shall be due to said claimants,

or either of them, the said parties shall take measures, within fifteen days after the lien shall take effect, or the claim shall be due, to settle the same by suit at law or otherwise, and bring the same to a close without delay, or be forever debarred of the benefits of said lien; and the owner or owners of said house or other building, and lot of land, upon which said lien rests, may be relieved therefrom, by paying the amount of money which, by contract, he or they are legally bound to pay, making a rebate of interest for the time unexpired, if by the contract the same should not be due, to the clerk of the county in which the lien is created, who shall receive and retain the same until the rights of the claimants shall be finally settled; and upon satisfactory evidence of such settlement, the said clerk shall pay to the claimant or claimants the amount which he or they shall be entitled to receive, in whole or part, as provided in the first section of this act, deducting from said deposit one per centum for his services for receiving and paying the same, and the surplus, if any, shall be paid to the depositor; and the certificate of such deposit shall be a bar to all suits or actions against the said owner or depositor by the claimants aforesaid; and upon such payment to the said clerk, as aforesaid, the said lien shall cease and determine, and the premises subject thereunto forever discharged therefrom, and satisfaction shall be entered on the docket aforesaid.

"6. *And be it enacted,* That any person performing such labour, or furnishing such materials in pursuance of any agreement made by him with the original contractor with such owners, or his said agent, who shall have done the acts prescribed by the second section of this act, to create a lien therefor, shall have a lien for only such labour as shall be performed, and for only such materials as shall be furnished subsequently thereto."

This act was extended to embrace the township of Belleville by the act of March 4, 1847 (p. 165); and both acts were by implication repealed by 1853, p. 437, § 17.

After the course of legislation which we have thus above briefly traced, the legislature, by **the act of March 11, 1853 (p. 437)**, undertook to enact a comprehensive measure, applicable to the whole state, and which read as follows:

"AN ACT to secure to mechanics and others, payment for their labor and materials in erecting any building.

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey,* That every building hereafter erected or built within this state, shall be liable for the payment of any debt, contracted and owing to any person for labor performed, or materials furnished, for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected.

"2. *And be it enacted,* That when any building shall be erected in whole or in part by contract in writing, such building, and the land whereon it stands, shall be liable to the contractor alone, for work done or materials furnished in pursuance of such contract; *provided,* such contract or a duplicate thereof, be filed in the office of the clerk of the county in which such building is situate, before such work done or materials furnished; and no building or land shall be liable for work done by any person, not employed by the owner or his agent, on his account.

"3. *And be it enacted,* That whenever any master workman or contractor shall, upon demand, refuse to pay any person who may have furnished materials used in the erection of any such house or other building, or any journeyman or laborer employed by him in the erecting or constructing any building, the wages due to him, it shall be the duty of such journeyman or laborer to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded, and the owner or owners of such building, shall thereupon be authorized to retain the amount so due and claimed by any such journeyman or laborer out of the amount owing by him or them to such master workman or contractor, giving him written notice of such notice and demand; and if the same be not paid or settled by said master workman or contractor, such owner or owners, on being satisfied of the correctness of such demand, shall pay the same, and the receipt of such journeyman or laborer for the same, shall entitle such owner or owners to an allowance therefor, in the settlement of accounts between him and such master workman or contractor as so much paid on account.

"4. *And be it enacted,* That if any building be erected

by a tenant or other person than the owner of the land, then only the building and the estate of such tenant, or other person so erecting such building, shall be subject to the lien created by this act and the other provisions thereof, unless such building be erected by the consent of the owner of such lands in writing, which writing may be acknowledged or proved, and recorded as deeds are, and when so acknowledged or proved and recorded, the record thereof and copies of the same duly certified shall be evidence in like manner.

"5. *And be it enacted,* That any addition erected to a former building, and any fixed machinery, or gearing, or other fixtures for manufacturing purposes, shall be considered a building for the purposes of this act; but no building shall be subject to the provisions of this act, for any debt contracted for repairs done thereto or alterations made therein.

"6. *And be it enacted,* That every person intending to claim a lien upon any building or lands by virtue of this act, shall within one year after the labor is performed, or the materials furnished, for which such lien is claimed, file his claim in the office of the clerk of the county where such building is situate, which claim shall contain these matters:

"I. A description of the building, and of the lot or curtilage upon which the lien is claimed, and of its situation sufficient to identify the same.

"II. The name of the owner or owners of the land or of the estate therein on which the lien is claimed.

"III. The name of the person who contracted the debt, or for whom, or at whose request the labor was performed, or the materials furnished for which such lien is claimed, who shall be deemed the builder.

"IV. A bill of particulars exhibiting the amount and kind of labor performed, and of materials furnished, and the prices at which, and times when the same was performed and furnished, and giving credit for all payments made thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant; which statement when the work or materials or both, are furnished by contract, need not state the particulars of such labor or materials, further than by stating generally that certain work therein stated was done by contract at a price mentioned; and such bill of particulars and statements shall be verified by the oath of the claimant, or his agent in said matter,

setting forth that the same is for labor done or materials furnished in the erection of the building in such claim described at the times therein specified, and that the amount as claimed therein is justly due; and when such claim shall not be filed in the manner or within the time aforesaid, or if the bill of particulars shall contain any wilful or fraudulent misstatement of the matters above directed to be inserted therein, the building or lands shall be free from all lien for the matters in such claim.

"7. *And be it enacted,* That every county clerk shall, at the expense of the county, provide a suitable well bound book, to be called the lien docket, in which he shall enter, upon the filing of any lien claim; first, the name of the owner of the building and land upon which the same is claimed; second, the name of the builder or person who contracted the debt; third, the description of said buildings and lands; and fourth, the amount claimed, and by whom claimed; and said clerk shall make a proper index of the same, in the name of the owner of the land and building; and such clerk shall be entitled to twelve cents for filing each claim or contract, and at the rate of eight cents per folio for such entry made in the lien docket, and six cents for every search in the office for such lien, claim or contract.

"8. *And be it enacted,* That when a claim is filed agreeably to the provisions of this act, upon any lien created thereby, the same may be enforced by suit, in the circuit court of the county where such building is situated, which suit shall be commenced by summons against the builder and the owner of the land and building, in the following or like form:

"Summon A. B., builder, and C. D., owner, (or if the owner contracted the debt) A. B., builder and owner, to appear before the circuit court, in and for the county of , at , in said county, on the day of , that the said A. B., (the builder) may answer unto E. F., (claimant) of a plea of (as in other cases of assumpsit, debt, or whatever the proper form of action for the debt may be) for which said E. F. claims a building lien on a certain building and lands of said C. D. (describing the building and lands as in the claim on file).

"And said summons shall be directed, tested and made

returnable, and may be served and returned in the same manner as other writs or summons; and such summons may be served upon the defendants, or either of them, in any county of this state, by the sheriff thereof, and for this purpose the same or a duplicate thereof, may be issued to such sheriff; and if any defendant cannot be found in this state, it may be served upon him by affixing a copy thereof upon such building, and also by serving a copy on such defendant personally, or by leaving it at his residence ten days before its return, which shall be deemed actual service, or in case such defendant resides out of this state, by affixing a copy on such building and sending a copy by mail, directed to him at the post office nearest his residence, or in case his residence is not known to the plaintiff, then by affixing a copy to such building, and by inserting it for four weeks, once in each week, in some newspaper of this state, published or circulating in the county where such building is situate, either of which shall be legal service; and when an affidavit shall be made and filed of the facts, authorizing and constituting any such service, not made by a sheriff or officer, the suit may proceed against the party so served as if such summons had been returned served by the sheriff.

"9. *And be it enacted,* That the declaration in such case shall, after reciting that both owner and builder were summoned and how served, be against the builder, and in the same form as in other cases of assumpsit, covenant, debt, or as the case may be, and shall conclude with an averment that said debt is, by virtue of the provisions of this act, a lien upon such building and lot, describing the same as in said claim; and to said declaration a schedule may be annexed, and the practice, proceedings and pleadings thereon, shall be conducted, and the judgment entered, as in suits in said circuit to recover money due on contract; and both or either of said defendants may, jointly or severally, have any defence or plea to the same, that might be had by the builder to any action on said contract without this act; and in addition thereto, the owner may plead that said house or land are not liable to said debt, and in such case it shall be necessary for the plaintiff, to entitle him to judgment against the house and lands, to prove that the provisions of this act, requisite to constitute such lien, have been complied with; and in case a verdict be rendered or judgment given against

the builder only, judgment shall be given for the land owner, with costs against the plaintiff; and in case judgment be given for the plaintiff, it shall be entered against the builder when he was actually served with the summons generally, and with costs as in other cases, and when only legal service of the summons has been made, judgment against the owner and also against the builder, shall be specially for the debt and costs, to be made of the building and lands in the declaration described; and in case no general judgment is given against the builder, such proceedings or recovery shall be no bar to any suit for the debt, except for the part thereof actually made under such recovery.

"10. *And be it enacted,* That where judgment is entered generally against the builder, a writ or writs of fieri facias may issue thereon as in other cases; and when judgment shall be against the building and lands, a special writ of fieri facias may issue to make the amount recovered by sale of the building and lands; and when both, a general and special judgment shall be given, both writs may be issued either separately or combined in one writ, and one may be issued after the return of the other for the whole or residue as the case may require; and such judgments may be docketed in the supreme court and execution had thereon as other judgments may be.

"11. *And be it enacted,* That under such special fieri facias, the sheriff or other officer shall advertise, sell and convey said building and lot, in the same manner as directed by law in case of lands levied upon for debt; and the deed given by such sheriff or officer, shall convey to the purchaser said building, free from any former encumbrance on the lands, and shall convey the estate in said lands, which said owner had at or any time after the commencement of the building, within one year before the filing such claim in the clerk's office, subject to all prior encumbrances, and free from all encumbrances or estates created by or obtained against such owner afterwards, and from all estates and encumbranced created by deed or mortgage, made by such owner, or any claiming under him, and not recorded or registered in the office of the clerk of the county at the commencement of said building.

"12. *And be it enacted,* That no debt shall be a lien by virtue of this act, unless a claim is filed as hereinbefore pro-

vided, within one year from the furnishing the materials or performing the labor for which such debt is due, and such part of any claim filed as may be for work done or materials furnished more than one year before the filing of the same, shall not be recovered against the building or land by virtue of this act, nor shall any lien be enforced by virtue of this act, unless the summons in the suit for that purpose shall be issued within one year from the date of the last work done or materials furnished in such claim; and the time of issuing such summons shall be endorsed on the claim by the clerk, upon the sealing thereof; and if no such entry be made within one year from such last date, such lien shall be discharged; *provided,* that the time in which such lien may be enforced by summons may be extended for any further period not exceeding one year, by a written agreement for that purpose, signed by said land owner and said claimant, and annexed to said claim on file before such time herein limited therefor shall have expired, in which case the county clerk shall enter the word "extended" on the margin of the lien docket opposite such claim; and any claimant, upon receiving written notice from the owner of the land or buildings requiring him to commence suit on such claim within thirty days from the receipt of such notice, shall only enforce such lien by suit to be commenced within said thirty days.

"13. *And be it enacted,* That such land and building may be discharged from any lien created by this act, (1) by payment and a receipt therefor, given by such claimant, which when the same is executed in presence of, and is attested by any officer entitled to take the acknowledgment of the execution of a deed, or when acknowledged or proved before such officer, shall be filed by such clerk, and the words "discharged by receipt" shall be entered by him in said lien docket, opposite the entry of said lien, (2) or by paying to said county clerk the amount of said claim; which amount said clerk shall pay over to said claimant, (3) by the expiration of the time limited for issuing a summons on such lien claim, without any summons being issued, or without notice thereof endorsed on said claim; (4) by filing an affidavit that a notice from the owner to the claimant, requiring such claimant to commence suit to enforce such lien in thirty days from the service of such notice; and the lapse of thirty days after

such service without such suit being commenced, or without an entry of the time of issuing such summons being made on such claim.

"14. *And be it enacted*, That all lien claims for erecting the same building shall be concurrent liens upon the same and the land whereon the same is erected, and shall be paid pro rata out of the proceeds thereof, when sold by virtue of this act; and for the purpose of distribution, the sheriff or other officer shall pay such proceeds to the clerk of said circuit court, to be by said court distributed among such claims filed, or as shall be filed according to this act before petition filed in said court for distribution thereof, and among such only; but the amount paid to any claimant shall not be paid over to him until after his claim shall have been filed for three months; and if a caveat be filed against such claim by the owner, or by any claimant or claimants owning together one-third of the lien claims filed against such building, then not until such claim shall have been established by a special judgment thereon; and such circuit courts shall have full power to adopt such rules of practice and pleading, and to make all orders necessary and proper to carry into effect the objects of this act, and to secure a proper disposition of the proceeds of sales to all persons entitled thereto by the provisions of this act.

"15. *And be it enacted*, That any land owner desiring to contest any claim and to free his house and land from the lien thereof, may pay to the county clerk the amount of such claim, with interest thereon, until six months after such payment, and twenty-five dollars in addition thereto, with notice to said clerk not to pay over the same until such claim be established by suit; which sum, or so much thereof as is necessary, shall be paid to such claimant upon his obtaining judgment against such buildings and lands, in the manner prescribed in this act, and said claim shall, from the payment of such money to such clerk, be a lien on said money, and said buildings and lands shall be discharged therefrom, and no execution shall issue against the same by virtue of such judgment; but if such suit is not commenced within the time which the said lands would be discharged by the provisions of this act without suit, or in case judgment be given therein without being against said lands, said sum shall be repaid to him by said clerk, and if judgment be given

against said lands for an amount less than that so deposited, then the surplus shall be returned by said clerk to said land owner.

"16. *And be it enacted,* That where a summons has been issued and served in any way prescribed by this act, to enforce any building claim lien against any building and lands, all other suits commenced by summons subsequently issued, to enforce concurrent liens against the same building and lands, may be stayed by the claimant therein or by order of the court, until judgment in such first suit, unless notice to enforce such other claim has been served, or a caveat has been filed against paying the same, as hereinbefore provided.

"17. *And be it enacted,* That the act entitled 'An act securing to mechanics and others payment for their labor and materials in erecting any house or other building within the limits therein mentioned,' approved April fifteenth, eighteen hundred and forty-six, and all supplements thereto, and all other acts and parts of acts contrary to, or within the purview of this act, are hereby repealed; but such repeal shall not affect any right acquired or lien filed under said acts, but the same shall remain and may be sued and prosecuted in all things as if said acts had not been repealed."

Subsequently various acts supplemental to the act of 1853, p. 437, or in modification thereof, were passed, viz.:

1855, p. 211. Approved March 9;
1859, p. 451. Approved March 16;
1860, p. 689. Approved March 22;
1863, p. 275. Approved March 14;
1866, p. 1015. Approved April 6;
1868, p. 369. Approved March 17;
1870, p. 65. Approved March 17;
1871, p. 66. Approved March 28;
1873, p. 71. Approved March 26;
1876, p. 66. Approved March 30.

The following is a brief review of these various acts:

The act of 1855, p. 211, extended the lien to mills, manufactories, and the land whereon the same were erected for debts contracted by the owner or with his written consent for repairs to fixed machinery, etc.

The act of 1859, p. 451, extended the lien to all buildings and the land for debts contracted by the owner or with his written consent for repairs to such buildings: "provided, that the agreement (presumably the agreement witnessing the owner's assent) be made a matter of record in the office of the clerk of the county."

The act of 1860, p. 689, defined and enlarged the meaning of the terms "fixtures for manufacturing purposes," as used in the fifth section of the act of 1853.

The act of 1863, p. 275, was so important an act that it is here set out in full:

"A SUPPLEMENT to the act entitled 'An act to secure to mechanics and others payment for their labor and materials in erecting any building,' approved March eleventh, eighteen hundred and fifty-three.

"1. BE IT ENACTED, *by the Senate and General Assembly of the State of New Jersey,* That the sale under a special scire facias, authorized by the eleventh section of the act to which this is a supplement, shall convey the estate of the owner in the lands and in the buildings, subject to all mortgages and other incumbrances created and recorded or registered prior to the commencement of the building; and in case of gearing or machinery, the bringing the same upon the premises, shall be such commencement; and such prior incumbrances shall have priority to all subsequent builders' liens upon said lands and upon all erections thereon, except such as by law may be removable as between landlord and tenant, which may be sold and removed by virtue of any building lien for the construction of the same free from such prior incumbrances.

"2. *And be it enacted,* That the third section of the act to which this is a supplement, be amended by authorizing and empowering any person who may have furnished materials used in the erection of any such house or building, to give the notice to the owner or owners of such building authorized by said section and the materialman shall have all the rights and remedies conferred by said section upon the journeyman or laborers.

"3. *And be it enacted,* That when the curtilage or lot on which the building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner, then the lot on which the building lien shall extend, shall be such tract as in the place of its location is usually known and designated as a building lot, and bounded by the lines laid down for its boundaries on any map made for the sale of it or on file in any public office, to lay out in lots the tract including it, and in cases where no such map exists,

such lot may be designated by the claimant in the lien claim, but in no such case shall the same exceed half an acre, or include any building not used and occupied with, or intended to be used and occupied with, the building for the cost of which the lien is claimed.

"4. *And be it enacted,* That the words: 'and no building or lands shall be liable for work done by any person not employed by the owner or his agent on his account,' contained in the latter part of the second section of the act to which this act is a supplement, be and the same is hereby repealed.

"Approved March 14, 1863."

Our attention is at once arrested by the second section of this act, which extended the right, to give a stop notice, to *materialmen.* The act of 1853, p. 537, § 3, as will be seen by reading it, did not do that, in that it omitted any provision for notice by the materialman to the owner, and failed to provide that the owner should retain the amount due to the materialman and pay it to him, as was noted in *Carlisle v. Knapp,* 22 Vroom 329.

The repealer in section 4, is also significant.

The act of 1866, p. 1015, extended the lien to buildings and lands, when the latter were the lands of a married woman, whether the debt was for the erection or reparation of a building; provided, the married woman consented in writing to the work done or materials furnished before a claim was filed.

The act of 1868, p, 369, related to the description of the lot or curtilage which might be subject to lien and to the amendment thereof before final judgment.

The act of 1870, p. 65, provided that a married woman's lands should be liable to a lien, etc., unless she filed a written dissent, etc.

The act of 1871, p. 66, extended the lien to all docks, wharves and piers upon any navigable river, and the land in front of which they might be erected and the interest of the owners of such lands in the soil or waters of such river, etc.

The act of 1873, p. 71, provided for apportioning a claim between two or more buildings built by the same person or persons.

The act of 1876, p. 66, relieved married women's lands of the liability imposed by the act of 1870, p. 65, when the woman owner did not authorize the work or was without knowledge of its being done.

All of the acts thus reviewed were substantially embodied in the Revision of March 27, 1874, as printed in the edition of 1877 at p. 667, §§ 1-28, which is readily accessible to practitioners, both in that revision or in the Gen. Sts., p. 2063, §§ 1-28.

Most of the acts passed since 1876 and prior to the revision of 1898 are to be found in the Gen. Sts., p. 2070, §§ 29-48. These are:

1877, p. 153.
1878, p. 243.
322.
1879, p. 77.
1883, p. 24.
1884, p. 260.
1888, p. 423.
1893, p. 385.
1895, p. 313.

Two acts not included in this list deserve a word.

By the act of 1890, p. 479, the provisions of the second section of the Revision of 1874, protecting the owner who had filed his contract, were coupled with a requirement that there must be a release of claims, pursuant to a stipulation to be inserted in the contract.

By the act of 1892, p. 358, the act of 1890, p. 479, was amended in sundry particulars.

Both of these acts were repealed by the act of 1895, p. 313, § 9. They were certainly extreme measures. The first one imposed upon the owner, already sufficiently burdened with liabilities it would seem, the duty of procuring releases from all possible claimants, in order to be safe; and left him no means of compelling the production of such releases, if he had been unwary enough to omit a stipulation for their production from his contract. It also failed to provide, in express terms at least, that an owner paying upon the faith of such releases, and the contractor's affidavit that there were no other persons who could claim, should be protected as against other claimants.

The act of 1892 remedied both these glaring defects by providing that the contractor should produce the necessary releases and affidavits before he could demand payment, and whether the contract called for such production or not; and by making a payment upon such releases and affidavit a good bar against all claimants who had not given the owner written notice that they had done work or furnished materials, or were about to do so. The cases decided under these acts were, *Anderson Lumber Co. v. Friedlander,* 25 Vroom 375; *Magowan v. Stevenson,* 29 Vroom 31; *Bruce v. Pearsall,* 30 Vroom 62.

After the General Statutes, and prior to the Revision of 1898, two acts were passed:

1896, p. 103.
1896, p. 198.

Both were embodied in the Revision of 1898. The following table will, perhaps be useful, to show where, in the act of 1898, the provisions of any previous act, from the time of the act of 1853, are embodied or are covered by similar or other provisions, etc.

1853, p. 437, §	1	1898, p. 538, §	1
	2		2
	3		3
	4		7

		5		8
		6		16
		7		17
		8		23
		9		24
		10		27
		11		28
		12		18
		13		31
		14		29
		15		32
		16		30
1855, p.	211, §	1		9
1859, p.	451, §	1		10
1860, p.	689, §	1		8
1863, p.	275, §	1		28
		2		3
		3		21
		4		2
1866, p.	1015, §	1	Omitted, see now	13
		2		26
1868, p.	369, §	1	See now	21
		2		20
1870, p.	65, §	1		13
1871, p.	66, §	1		11
1873, p.	71, §	1		22
1876, p.	66, §	1		13
1877, p.	153, §	1		16
1878, p.	243, §	1		16
	322, §	1	Omitted, see	16
1879, p.	77, §	1		14, 28
1883, p.	24, §	1		10
1884, p.	260, §	1		23
		2		24
1888, p.	423, §	1		18
1890, p.	479, §	1	Omitted	
		2	Omitted.	
1892, p.	358, §	1	Omitted.	
		2	Omitted.	
1893, p.	385, §	1	1898, p. 538, §	12
		2		12
1895, p.	313, §	1		2
		2		3
		3		4
		4		16, 18
		5		5
		6		15, 28
		7		6
1896, p.	103, §	1		31
	198, §	1		16, 18

There are three reported cases arising under the lien acts, earlier than the act of 1853.

The first of these cases is *Sherer & Nichols v. Collins*, 2 Harr. 181. In this case the claim was for labor and materials in erecting a paper mill, and was filed under the act of 1835, p. 148. The claimant brought assumpsit and had judgment. Then other general judgment creditors of the owner attempted to question this judgment (upon a case stated and brought into the Supreme Court as upon a writ of error) upon the ground that the claimant's judgment was for a sum which included particulars for which he had no right of lien. It was held that the judgment could not be thus collaterally questioned by one not a party to it; but it was intimated, by Hornblower, C. J., that in a suit to enforce a lien, whether by scire facias or assumpsit, it would be irregular to include any demand beyond that for which the statute gives the lien. The opinions of the justices in the case note that the construction of the act of 1835 bristled with difficulties, not to say impossibilities.

The second case is *Vandyne v. Vanness*, 1 Halst. Ch. 485, and arose under the act of 1835. The chancellor held that the right of lien extended to so much of the whole tract upon which a building was erected, as would, with the building, suffice to satisfy the claim.

The third case was *Sinnickson v. Lynch*, 1 Dutch. 317. It arose under the Revision of 1846, as amended by the act of 1851, p. 187. It decided that on scire facias to enforce the lien given by the act, the claimant's debtor as well as the owner of the building and land must be joined, as a party defendant.

CHAPTER II.

The Text of the Act of 1898 (Revision), with All Subsequent Related Acts and Notes of Pertinent Decisions.

MECHANICS LIEN LAW.

Revision of 1898.

TITLE OF STATUTE.

"An Act to secure to mechanics and others payment for their labor and material in erecting any building (Revision of one thousand eight hundred and ninety-eight)."

1898, p. 538, Approved June 14, 1898.

The title of the act of 1898 is the same as that of the act of 1853, p. 437.

CONSTITUTIONALITY OF THE STATUTE. In *Gardner & Meeks Co. v. New York Central R. R. Co.,* 43 Vr. 257, the Court of Errors and Appeals holds that the mechanics lien act does not deprive an owner of property, without due process of law, nor does it interfere with his right to acquire and enjoy property, and is not, therefore, unconstitutional on either ground.

CONSTRUCTION OF THE STATUTE. The remedy, under the statute, must not be extended beyond its obvious design and clear requirements. *Ayres v. Revere,* 1 Dutch. 474; *Associates v. Davidson,* 5 Dutch. 415; *Griggs v. Stone,* 22 Vroom 549; *Scudder v. Harden,* 4 Stew. 503.

In *Ayres v. Revere,* Chief Justice Green said: "The lien and the mode of enforcing it are creatures of the statute. They are unknown to the common law. The statute charges the property of one man with the debt of another. Though the owner may have paid the contractor in full for the erection of the building and for all the materials used in its construction, his property is nevertheless charged by the default of the contractor with the repayment of the debt. It gives preference to one class of creditors over another. The man who has furnished a brick, or a stone, or a plank, for the erection of the building, or who has labored a day in its construction is secured his remuneration in full, while those who have furnished provisions for the owner and his family, who have supplied them with the necessaries of life, or who have toiled in their service, are deprived of all means of recompense until the favored creditors are satisfied. It reaches to the claims of mortgage and judgment creditors, and super-

sedes even these encumbrances, if created after the building is commenced, in favor of the subsequently created debts of a favorite class of creditors. It gives to the favored creditors a remedy not only against his debtor, but against an innocent third party, with whom he has never contracted, and for whom he has never labored. It gives him a cumulative remedy, which, if enforced, may compel the owner to pay a debt which he has once satisfied in full; and it may be, as in this instance, that this hardship will result from mere inadvertence in filing his contract, or from misapprehension of the precise meaning of a statute.

These suggestions are not made with the design of impugning the wisdom or the policy of the law, but to show that the statute is not of that purely remedial character which calls for a peculiarly liberal construction at the hands of the court. The statute has prescribed the mode of proceeding to enforce the lien. — — — Neither a sound construction of the statute, nor the promotion of the ends of justice requires that the statutory remedy should be extended beyond the obvious design and clear requirements of the law."

Justice Whelpley, in *Associates, etc., v. Davidson,* said: "The lien law, so far as it operates to charge the lands of a party with a debt not contracted by him, or for his ultimate benefit, should be strictly construed."

Vice Chancellor Van Fleet, in *Dalrymple v. Ramsey,* 18 Stew. 494, said: "The statute is an innovation. The lien and the mode of enforcing it are creatures of the statute. The lien is just what the statute makes it. The courts have no power either to enlarge or lessen it. Independent of the statute, a debt contracted in the erection of a building stands no higher, in point of natural justice, than many other debts, and the lienable quality of such a debt should, therefore, be rigidly restricted to just what the legislature has made it." See also *Bartley v. Smith,* 14 Vroom 321.

In *McNab, etc., Co. v. Paterson Building Co.,* 2 Buch. 929, the Court of Errors and Appeals says, per Dill, J.: "It may be argued with force that Mechanics Lien laws are, as a rule, to be construed strictly against the claimant and in favor of the the owner of the land in so far as they require the owner to pay a debt that he did not contract, and for a consideration that he may already have paid to the contractor."

See also the elaborate opinions of Vice Chancellor Stevenson, in *McNab, etc., Co. v. Paterson Bld. Co.,* 1 Buch. 133, and *Beckhard v. Rudolph,* 2 Rob. 315. Although the Court of Errors and Appeals did not adopt his view of the construction that should be given to the third section of the act, on the point there in question; it will not do to assume that the court is committed to the view that a provision of the act, which is plainly in derogation of common right, is not to be construed strictly in favor of the owner; although it is somewhat difficult to perceive how the third section can be considered as being not in such category. Perhaps the true solution is that the construction adopted by

the Court of Errors and Appeals, in the *Beckhard* and *McNab* cases (2 Rob. 740; 2 Buch. 929), is not a liberal construction at all, but is one which results from the plain and usual meaning of the words of the act, read in the light of its "obvious design and clear requirements." When there is room for construction at all the settled canons of the law must of course apply, and the distinctions pointed out by Vice Chancellor Stevenson, in the *McNab* case, as to the nature of the transaction, the legal relation of the parties, and the general policy of the law, are always material to be attended to.

Building and curtilage liable to lien for the erection and construction of building.

1. Every building hereafter erected or built [1] within this state shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof,[2] which debt shall be a lien [3] on such building, and on the land whereon it stands,[4] including the lot or curtilage whereon the same is erected.[5]

1898, p. 538, § 1; 1853, p. 437, § 1; Revision 1904, § 1. This section is identical with § 1 of the act of 1853, p. 437, and with § 1 of the Revision of 1874.

1. A HEATER AND RANGE are part of the building, although slightly attached thereto, if put in by the owner as part of the building. *Erdman v. Moore,* 29 Vroom 445; *Porch v. Agnew Co.,* 4 Rob. 328 (Grey, V. C.).

A TWELVE FOOT RANGE, THREE FIRES, THREE OVENS, built into the building by brick flues connecting with the chimneys, BOILER and STEAM PIPE coming through the floor and connecting with the boiler of the house, large HOTEL VEGETABLE KETTLES connected with the steam pipes, A TWENTY-FIVE FOOT HOOD over these fixtures and various other KITCHEN EQUIPMENTS fitted to the supply and waste pipes of the building, all in a hotel kitchen and attached with the owner's intention, and that of the party supplying them, that they should become parcel of the hotel structure, are the subject of a mechanic's lien.

ADDITIONS to a building, and fixed machinery or gearing or other fixtures for manufacturing purposes are a building, by virtue of § 8, which see. In many instances these fixtures are part of the realty, without reference to the provisions of § 8. *Bates Co. v. Trenton,* 41 Vroom 684 (E. & A.).

ALTERATIONS of an old building are not a building erected or built, within the meaning of this section; although they make such changes that, in a fair sense, it might be said to be a new structure. *Combs v. Lippincott,* 6 Vroom 481. But see § 10, by

which (since 1883) a mechanic's lien is extended to a building and its curtilage, for alterations.

REPAIRS to a building. The act of 1859 extended the lien, against the building and curtilage, to the case of repairs, with certain restrictions as to other encumbrancers. See § 10.

THE COST OF HAULING engines from the freight station to their site in the power house is properly included in the claim for erecting them, when the duty to haul them was part of the contract to erect them. *Bates Co. v. Trenton Co.*, 41 Vroom 684 (E. & A.).

2. AN ARCHITECT who draws plans and superintends the building may have a lien. *Mutual Benefit, etc., Co. v. Rowand*, 11 C. E. Gr. 389.

ENTIRE CONTRACT. A claimant who has furnished materials, under an entire contract between him and the builder, may have a lien upon a quantum valebat, if the contract, though unfulfilled, was lawfully rescinded. *Brewing Co. v. Donnelly*, 30 Vroom 48. In the absence of such rescission, the right to file a lien accrues only after the contract has been completed. *Edwards v. Derrickson*, 4 Dutch. 39 at p. 68; 5 Dutch. 468.

MATERIALS NOT USED. The right to the lien for materials depends upon the fact that the debt was incurred and the materials furnished for the building; and, in the absence of fraud, it is immaterial that they were not in fact so used. *Morris Co. Bank v. Rockaway Mfg. Co.*, 1 McCart. 189; *Campbell v. Taylor Mfg. Co.*, 51 Atl. R. 723; *Bell v. Mecum*, 68 Atl. R. 149 (E. & A.).

OWNER'S CONSENT. See §§ 7 and 13 *post*.

WHO MAY HAVE A LIEN. All persons who, under any circumstances whatever, furnish labor or materials for the building may have a lien; unless precluded by the fact that a written contract has been filed. *Van Pelt v. Hartough*, 2 Vroom 331; *Murphy v. Nicholas*, 37 Vroom 414; *Coddington v. Beebe*, 2 Vroom 477; *Gardner & Meeks Co. v. New York Central R. R.*, 43 Vroom 257 (E. & A.); *Snyder v. New York Co.*, 43 Vroom 262.

In the absence of conflicting claims between the person who actually does the work and the employer of such person, the employer is entitled to have a lien therefor. *Bates v. Trenton Co.*, 41 Vroom 684 (E. & A.).

ASSIGNABILITY OF LIEN CLAIM. There are, as yet, no reported cases on this subject in this State. It is generally held in other jurisdictions, and it would seem to be beyond question here, that a perfected lien claim may be assigned the same as any other chose in action may be. Like a mortgage, the lien claim is a security for the debt, so that, presumably, an assignment of the debt would, ipso facto, assign the lien, in the absence of any thing to control otherwise; while an assignment of the lien alone would not probably assign the debt itself.

Whether recent statutes enabling the assignee of a chose in action to bring suit in his own name would apply, or not, is, of course, a question for consideration; but the better practice,

in any case, would be to bring suit in the name of the claimant for the benefit of the assignee.

It probably is not necessary that the assignment should expressly confer the right to enforce the claim in the name of the claimant, but prudence will obviously dictate that an assignment should be so drawn.

As to the matter of assigning a right to a lien, before the assignor has himself perfected it, that is, an inchoate lien, there is much more doubt. Decisions in other jurisdictions vary upon that question, some holding that an inchoate lien can and others that it cannot, be assigned. Reference should be had to works which treat generally upon the subject. The scope of this manual is purposely limited to the decisions of the courts of this State, and the only case that refers to the subject at all, so far as I am aware, is *South End Imp. Co. v. Harden,* 52 Atl. 1127, in which it was found unnecessary to consider whether the assignee, or the assignor, of a debt for materials should take the steps necessary to perfect the inchoate lien, by giving notice, etc. See also *Hall v. Jersey City,* 17 Dick. 489.

3. A LIEN ATTACHES as of the date the building was begun. *Manhattan, etc., Co. v. Paulison,* 1 Stew. 304. See § 28 and cases there cited, as to what is the beginning of the building.

WAIVER OF LIEN. The benefit of the statute may be waived by taking security in another form. *Quick v. Corlies,* 10 Vroom 11.

TAKING NOTES for a lien claim is no abandonment of the right to a lien, *Edwards v. Derrickson,* 4 Dutch. 39; *Slingerland v. Lindsley,* 1 N. J. L. J. 115; nor is an agreement to take them a waiver, *France v. Netherwood,* 2 N. J. L. J. 90; but if a note is taken, it suspends the right until the maturity of the note, *Dey v. Anderson,* 10 Vroom 201; or until its surrender and cancellation, perhaps. See *Burd v. Huff,* 17 N. J. L. J. 80. Where a material man accepted two notes, maturing at different times, for a general account current, a part of which was for the materials for which he claimed a lien, and nothing was said, as to how the notes were to be applied to the account, and the note first maturing was not paid, and the other did not mature until after the time to file a lien claim would expire; it was held, by the Court of Errors and Appeals (Dixon, J., dissenting), that the note which had not matured must be applied to the earliest items of the account, pro tanto, even although the result was to deny the lien, as the items included in the lien claim were among such earlier items. *Dey v. Anderson,* 10 Vroom 201.

ACCEPTING AN ASSIGNMENT OF THE CONTRACTOR'S RIGHTS under a building contract, as collateral security, does not impair the assignee's right to claim a lien for his materials or labor furnished. *Stevenson v. Meeker,* 18 N. J. L. J. 51; *Taliaferro v. Stevenson,* 29 Vroom 165.

A BUILDER'S AGREEMENT TO TAKE HIS PAY IN MORTGAGES precludes his right to claim a lien, when it does not appear that there has been any fraud, or any inability or re-

fusal to give them in compliance with the contract, upon demand. *Weaver v. Demuth,* 11 Vroom 238.

4. A LOT OF LAND UNDER TIDE WATER, over which a floating dock is constructed and moored, is not a lot or curtilage within the meaning of this section, *Coddington v. Beebe,* 2 Vroom 477; but see now, § 8.

5. THE LAND OF A MINOR cannot be subjected to a mechanic's lien, *Hall v. Acken,* 18 Vroom 340; nor, prior to the married woman acts, could that of a MARRIED WOMAN, *Johnson v. Parker,* 3 Dutch. 239.

MUNICIPAL LANDS, cannot be liable to a mechanic's lien; when such lands are used, or designed to be used, for its public purposes. *Frank v. Freeholders,* 10 Vroom 347. But see below under § 3.

A MERE TRANSITORY SEIZIN is insufficient to support a lien, *Clark v. Butler,* 5 Stew. 664; *Macintosh v. Thurston,* 10 C. E. Gr. 242.

ESTATE OF OWNER. The owner of the building must have some estate in the land, in order that a lien may attach to either the land or the building, *Coddington v. Beebe,* 2 Vroom 477; *Babbitt v. Condon,* 3 Dutch. 154; *Leaver v. Kilmer,* 59 Atl. 643 (E. & A.); *Wm. H. Atkinson Co. v. Shields Co.,* 72 Atl. 81 (E. & A.); but it is not necessary that he should have an estate when the building is begun, § 28 gives the lien on "the estate which the owner had at the commencement of the building, or which he subsequently acquired," and the right having once arisen, remains effective against any subsequent grantee. *Stewart Co. v. Trenton Co.,* 42 Vroom 568 (E. & A.).

ESTATE BY ENTIRETY. Prior to the married woman's acts, the estate of the husband, for the joint lives, was the only estate which could be subjected to a mechanic's lien. *Washburn v. Burns,* 5 Vroom 18. In the case last cited the husband contracted to have the building erected, the wife gave no consent; and it was held, that the husband's estate, only, was liable to the lien. The case arose and was decided before 1870, when the act which is now section 13 post, was passed.

EQUITABLE ESTATES. In *Corcoran v. Jones,* 12 N. J. L. J. 38, per Scudder, J., at circuit, it was held that a court of law, in a suit on a lien claim, cannot take cognizance of an equitable estate, such as the right of a tenant to exercise an option of purchase, on the expiration of his tenancy. In *Dalrymple v. Ramsey,* 18 Stew. 494, V. C. Van Fleet, in an able opinion, held that the statute does not extend to equitable, but only to legal, estates; and he, therefore, held that a claim could not be enforced, as a lien, against the estate of the beneficiary, under a resulting trust, who was in possession of the land and caused the buildings to be erected thereon.

On the other hand, in *National Bank, etc. v. Sprague,* 5 C. E. Gr. 13, it was held that a lien does attach to the equitable estate of a vendee in possession who subsequently obtains a conveyance; and

in *Currier v. Cummings*, 13 Stew. 145 (per Bird V. C.), it was held that it attached to the estate of a tenant in possession with an option to purchase at the expiration of his tenancy, although in the meantime the tenancy has expired, the tenant has yielded possession, and has failed to exercise, and does not claim the right to exercise his option. Finally, in *Scott v. Reeve*, 10 N. J. L. J. 12 (per Parker, J., at Circuit) it was held, in a suit to enforce a lien claim, that the plaintiff should have judgment against the estate of a vendee in possession, who died without obtaining a conveyance and whose heirs subsequently released their right to a conveyance.

Effect of filing a written building contract; excludes lien of any but contractor.

2. When (*ever*) any building shall be erected in whole or in part by contract in writing,[1] such building and the land whereon it stands shall be liable to the contractor alone[2] for work done or materials furnished in pursuance of such contract; provided, said contract, or a duplicate thereof, (*together with the specifications accompanying the same, or a copy or copies thereof,*)[3] be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished.[4]

1898, p. 538, § 2; 1853, p. 437, § 2; 1863, p. 275, § 4; Rev. 1874, § 2; 1895, p. 313, § 1 (—).

The words in parenthesis (—) were added to this section by the act of 1895, otherwise the section is practically identical with the act of 1853, § 2, and the Revision of 1874, § 2; but the act of 1853 had at the end of the section the following words which were repealed by the act of 1863, p. 275, § 4, and so were omitted in the Revision of 1874—"and no building or land shall be liable for work done by any person, not employed by the owner or his agent, on his account." The effect of these words, as held by the Court of Errors in, *Associates, etc., v. Davison*, 5 Dutch. 424, had been, to exempt a building from the lien of any employee of the contractor, when there was a contract in writing, even although it had not been filed. In *Van Pelt v. Hartough*, 2 Vroom 331, it was said (per Beasley, C. J.) that the provisions of the first section were so comprehensive, that, if left unconfined by subsequent restrictions, a lien would be given to all persons who, under any circumstances whatever, furnished either labor or materials for the building. The omission of these words, by the act of 1868 has, therefore, left the comprehensiveness of the first section unrestricted, except in the case of a contract which is in writing and has been filed.

See at the end of Note 3, below, for the text of this section as amended by the act of 1910, page 472.

See under BUILDING CONTRACT (Forms No. 1, etc.) for the cases upon the various provisions usually contained therein.

1. FRAUDULENT CONTRACT. The contract must be neither fictitious nor fraudulent; it must be between parties who are actually contracting with each other, *Young v. Wilson,* 15 Vroom 161, reversing s. c., 3 N. J. L. J. 209; and must honestly state the real price, *Murphy, etc., Co. v. Nicholas,* 49 Atl. R. 447; otherwise, filing the contract will not protect from liens of material men and laborers.

OWNER'S SIGNATURE TO CONTRACT. The Supreme Court in *Willetts v. Earl,* 24 Vroom 270, decided that, in order that the lands of the owner might be protected from liens by the filing of the contract, such contract must appear, on its face, to be the contract of such owner. The owner in that case was a married woman and the contract, which was filed, purported to be the contract of her husband only, as owner, and was signed by him only. The reasoning was that a contract which did not itself disclose that it was the contract of the actual principal would not show one of the essentials of such contract; and so would not be, as to such essential, a contract in writing: that the owner's name is probably the most significant and notorious fact by which a filed contract can be connected with the building to be erected under it: that the owner is the one interested, and therefore under a duty, to file the contract, in order to exempt his property from liens: that if the filing of a contract by an agent in his own name is sufficient, parties interested, who had learned the name of the real owner, would be chargeable with notice of whatever agencies he might have chosen to create which would be an unreasonable burden to impose upon them: and that under the construction adopted, the filed contract will indicate, to persons whose claims to lien are barred, the party upon whom, in a proper case, notice under the third section may be served.

In *Neill v. Watson,* 15 N. J. L. J. 138, in an identical case, Depue, J., at circuit, had previously held that the filing of such a contract did protect from lien the land of the married woman owner; because, by virtue of the act of 1876 (now § 13), her lands are made liable for any building erected upon them with her knowledge, unless she files the written dissent, as there specified, and that as the contract, when filed, left her lands still liable to the contractor, they should be exonerated from other liens thereby, and without obliging her also to file such written dissent.

In *Earle v. Willets,* 27 Vroom 334, the Court of Errors and Appeals reversed the decision of the Supreme Court, in the case first above cited, and held that the filing of the contract protected the wife's lands from liens, other than that of the contractor, in the absence of anything to indicate that the contract was thus executed with any fraudulent intent to cheat workmen or materialmen. In thus holding, the opinion of the Court of Errors and

Appeals does not discuss whether or not a married woman is entitled to the protection of filing the contract because of the peculiar liability of her lands. It does not refer to §13, at all, but puts the decision on the ground that the language of § 2 does not import that the contract there mentioned must be made in, or signed with, the name of the owner. The proposition—that a contract which does not disclose, either in the body of it or by the manner in which it is signed, the name of the person who is actually the one contracting, as owner, is not, in an essential particular, a "contract in writing"—is not discussed. The reasoning of the opinion is applicable to the case of any owner.

In the case of *Gardner & Meeks Co. v. Herold,* 72 Atl. 24, concurring opinion of Parker, J., 74 Atl. 568, the same situation was presented to the Court of Errors and Appeals, but this time in an action at law upon a stop notice given by a materialman to the married woman owner. It was held, that such notice was properly given. In his opinion concurring in that result, Justice Parker rests his approval on the ground that the contract was found to be the contract of the wife, signed by her husband as her agent, with no fraud intended. In the opinion of Justice Swayze, it is noted that the decision does not make it possible for a materialman to serve a stop notice upon an owner in any case where the contractor could not have a right of lien, as against him; and it is said that such right of lien can exist only where the building is authorized by the owner, or built with his knowledge, except in the case of married women who are presumed to consent, unless they file an objection; and it is further said, that the provision that her dissent shall state that the building is being erected against her wishes and consent involves a pretty clear implication that the statutory consent is not to be presumed except in a case where she has knowledge and fails to file her dissent. It would seem that the proviso at the end of this same section (13) involves, much more strongly, the same implication, for it says that her lands shall not be liable to a lien for any building or repairs built or done without her knowledge.

It is plainly just that the filing of such a contract should be held to protect a married woman's lands from liens, when she has had knowledge of the building, without filing her dissent; because the statute (§ 13), by conclusively presuming her consent from her knowledge, makes such a contract her contract, and so imputes, to every one concerned, the knowledge that it is hers. In such case, it is not an essential part of the written contract that it should disclose the fact that she is the principal party, as owner, therein: the statute operates to bind her lands, and affects all persons concerned, as claiming liens, and, therefore, as asserting the right to give stop notices, just as though such contract were, on its face, expressed to be hers. She may, therefore, have the benefit of the filing of such a contract, and may be accountable to claimants, upon stop notice, because, without her name appearing therein as the principal, it is *her* contract which in contemplation of the statute is filed. Upon this ground the decisions thus

far made, may be rested with assurance, as they are all decisions of cases of married women owners.

But when we come to the case of an owner, not a married woman, it is by no means clear that the same result will, or should be, reached. The seventh section provides that the lands of such other owner shall not be liable to lien for the erection of a building under a contract to which he is not, in fact, a party; unless he consents in writing to the erection thereof. So long, therefore, as he is not the real contracting principal, and does not consent to the erection of such building in writing, he is in need of no protection, and neither he, nor his lands, can be in anywise liable therefor. As he can incur no liability, in such case, he is obviously not the person for whose benefit the statutory provision is intended. But if he is, in fact, the real contracting party, and yet the contract, as filed, does not disclose the fact; why should he be able to claim the benefits of the second section, and thus cut off the liens of materialmen and mechanics, or limit these claimants to such as can give valid notice, under the third section, if they are fortunate enough to discover the undisclosed agency before he has settled with the builder?

When Chief Justice Green, in *Ayres v. Revere,* 1 Dutch. 474, said that "*one* design of requiring the contract to be filed must have been to apprize all mechanics and materialmen to what extent the building was exempt from liens, and how far they must look to the responsibility of the builder alone for their remuneration," he was very far from asserting that that was the *only* design of that section. Another equally obvious design of that requirement, when the third section is read with it, is to apprize mechanics and material men, *with certainty,* of the person who has contracted with the builder to whom they are supplying labor or material. If this be not so, why should the statute require the *contract* to be filed? Why should not a mere notice suffice which should put on the record the information that any one supplying materials or labor to the builder for a certain building about to be erected by him must look to such builder only for their compensation?

The reason why the owner should disclose his participation upon the record is plain enough. It is within his power to make it thus incontestably apparent that he is the real principal, whenever that is, in fact, the case; while, on the other hand, without such action on his part, it will always be burdensome, and often impossible, for claimants to satisfy themselves, or any one else, *in advance of a verdict,* whether he is, or is not, such principal.

Upon the decisions thus far there is, then, a dilemma—Suppose a mechanic says I have furnished B. with materials for a house he is erecting for C. under a written contract, filed. I find that A. actually owns the land, and although I suspect that he is really the undisclosed principal for whom C. acted in making the contract, I can elicit no positive information from either A. or C. Both simply look pleasant and tell me that they do not feel it incumbent upon them to venture any statement in the premises. What shall I do?

Manifestly the only possible answer is, you had better file a lien claim against A. and bring suit upon it and, at the same time, serve a stop notice on A., and bring another suit upon that. You will, of course, lose one of your suits in any event and have to pay costs; but no one can tell which of the two you will lose. You may also lose both of them and have to pay costs. That depends upon whether A. is really the undisclosed principal or not. If he is not, you lose both suits. If he is, then you lose the lien claim suit and win the stop notice suit, in case the Court of Errors and Appeals says that he is entitled to the benefit of the filed contract; or you win the lien claim suit and lose the stop notice suit, in case that court says that he is not entitled to the benefit of the filing. There is an additional matter which makes the whole situation most interesting, although your preoccupations as a layman may prevent you from appreciating its charm, and that is that the court might possibly say that the attitude of A. and C., upon your request for information, was more polite than virtuous, that their refusal to answer categorically was tantamount to a fraud upon you, and their "placid smile but a wile of guile." In that event, you will lose the stop notice suit and win the lien claim suit. In such a dilemma, our mechanic has no one to blame if A. is not really the principal party to the building contract: but the case is quite otherwise, if A. is such principal; and, in such case, it seems just that he should either disclose that fact, in advance on the record, by having the filed contract set it forth, or else be liable to have his lands subjected to the mechanic's lien. The ground for such a rule, suggested by Justice Dixon, in *Willetts v. Earl,* is, that the second section has no application where the building contract is not in writing; that the contract cannot be said to be in writing when it omits to set forth an essential part of it; that it does omit an essential part when it does not disclose the real principal party thereto, and he is not disclosed by some other sufficient means (as is the case with married women by the statute); and that, therefore, the contract in contemplation of the statute cannot be said to have been filed.

2. WHEN LIABILITY ACCRUES. The liability to the contractor does not accrue until the contract has been performed according to its terms. *Bozarth v. Dudley,* 15 Vroom 304; *Byrne v. Sisters, etc.,* 16 Vroom 213; *Chism v. Schipper,* 22 Vroom 1; *Kirtland v. Moore,* 13 Stew. 106; *Bradley, etc., Co. v. Berns,* 6 Dick. 437; *Bernz v. Marcus Sayre Co.,* 7 Dick. 275; *Smith et al. v. Dodge & Bliss Co.,* 44 Atl. R. 639; *Booth v. Kiefer,* 47 Atl. R. 12; *Blauvelt v. Fuller,* 48 Atl. R. 538.

The contract is, however, so performed, so far as relates to the completion of the building, when it is *substantially* performed. The rule on this subject, as established in this State, may be thus stated:

(a). The rule that when a contract remains unperformed, though in slight particulars, no recovery can be had either upon it or upon an implied contract, quantum meruit, is modified in the case of a building contract so as to permit a recovery when there

has been a mere technical, inadvertent, or unimportant deviation from its terms, but a *substantial* compliance with them. In such case a proper allowance or deduction from the contract price must be made for the deficiencies.

(b). Where, however, there is a *substantial non* performance, there can be no recovery on the contract; and there can be no recovery, in such a case, under the common counts, for the value of so much as may have been accomplished, unless the owner has actually accepted such partial performance; and such acceptance is not to be presumed from the owner's possession and use, although it may be inferred therefrom and from other circumstances.

(c). Where a plaintiff can show *substantial* performance, *in his suit upon the express contract,* he need not show the owner's acceptance; but the case is otherwise if his action be upon the common counts, as upon an implied contract.

These rules are established by the following decisions: *Bozarth v. Dudley,* supra; *Feeney v. Bardsley,* 37 Vroom 239; *Dyer v. Lintz,* 69 Atl. 908; *Loh v. Broadway Ry. Co.,* 71 Atl. 112; *Isetts v. Bliwise,* 43 Vroom 102.

DISPUTED PERFORMANCE. In case there is a dispute as to whether the contract has been performed, and the owner and builder submit the dispute to arbitration, the owner's liability cannot mature until the award is made. *Booth v. Kiefer,* 15 Dick. 57.

DEVIATIONS AND EXTRA WORK. Filing the contract does not protect the owner from liens, for work or materials, not done or furnished pursuant to the contract; as where the owner himself employs mechanics or furnishes materials. *Mechanics, etc., Co. v. Albertson,* 8 C. E. Gr. 318; *South End Imp. Co. v. Harden,* 52 Atl. 1127; but it is otherwise if the deviations and extra work are such as are stipulated for by the contract. *Willetts v. Earl,* 24 Vroom 270; *Dunn v. Stokern,* 16 Stew. 401.

ABANDONMENT OF CONTRACT, by owner and contractor, after a claimant has furnished materials or labor pursuant to it, does not give the latter a lien, if the contract was filed, *Willetts v. Earl,* 24 Vroom 270; and if the contract is abandoned by the contractor under such circumstances as give him no right to recover any part of the contract price, such claimant can have no remedy, unless perhaps upon offering himself to complete the contract. *Bernz v. Marcus Sayre Co.,* 7 Dick. 275 (286), holding apparently otherwise than V. C. Bird, in *Bradley & Currier Co. v. Berns,* 6 Dick. 437, but:

SUBSTITUTED PAROL CONTRACT. If, after a written contract is filed, the owner and the builder agree to abrogate it, and the work is completed under a substituted parol contract, a subcontractor, or other person furnishing labor or materials therefor, may have a lien on the land and building. *Buckley v. Hann,* 39 Vroom 624. The jury found, in this case, that the contract was not, in fact, abrogated.

See also notes to form of building contract, post.

ASSIGNMENTS. The contractor may, of course, assign the moneys due, or to grow due, to him under the contract. An assignment of less than the whole debt becomes complete, at law, only by the acceptance of the debtor; but an unaccepted assignment of part of a debt is as valid in equity as though accepted. *Supt. v. Heath,* 2 McCart. 22; *Bradley, etc., Co. v. Berns,* 6 Dick. 437; *Kirtland v. Moore,* 13 Stew. 106.

VALIDITY OF ASSIGNMENT. A provision in a paving contract, that if the contractor failed to pay his employes or material men, the city might forfeit the contract and apply the moneys then earned by the contractor in payment of such labor and materials, does not deprive the contractor of his right to make an assignment, and such assignment, if made before the contract is declared forfeited, is good, to the extent of the moneys earned by the contractor, both as against the city and the creditors of the contractor. *Shannon v. Hoboken,* 10 Stew. 123. So a provision in a building contract which stipulates that the builder shall not make an assignment without the owner's consent, and stipulates that the latter may, on breach of that stipulation, terminate the contract, is available only to the owner; that is, an assignment made in violation of the contract is good as to others, and, as to the owner himself, is voidable only, and the right to treat it as void is waived by allowing the contractor to go on with his work. *Burnett v. Jersey City,* 4 Stew. 341. The same is true if the owners fails to annul the contract within a reasonable time after notice of such assignment, *Turner v. Wells,* 45 Atl. R. 641; and in view of § 340, Gen. Stats., p. 2591, a stipulation for the absolute non assignability of money due or to grow due, under a written contract, is probably void. *Turner v. Wells,* supra. Where a contractor agrees to take two houses in part payment on final settlement, he may make a valid agreement to convey such houses before he has finished his work. *McPherson v. Walton,* 15 Stew. 282. (This case is a very perplexing one, as it is reported.)

FORM OF ASSIGNMENT. An order, writing, or act which makes an appropriation of the fund is a good equitable assignment. *Shannon v. Hoboken,* 10 Stew, 123; *Lanigan v. Bradley, etc., Co.,* 5 Dick. 201; and it is sufficient if the assignor presently strips himself of his interest in the fund, or some part of it, although the right to immediate payment is not thereby conferred upon the assignee. *Weaver v. Atlantic, etc., Co.,* 40 Atl. R. 858.

EFFECT OF ASSIGNMENT is, in equity, to put the assignee in the place, and on the footing, of the assignor; that is, to subrogate him to the rights of the latter. *Bernz v. Marcus Sayre Co.,* 7 Dick. 275; *Board of Education v. Duparquet,* 5 Dick. 234; *Lanigan v. Bradley, etc., Co.,* 5 Dick 201. In *Board of Education v. Duparquet,* it is said that this effect follows immediately upon the making of the assignment, and before notice to the debtor, the office of presentation, or notice, being merely to prevent the debtor from dealing with the assignor in good faith as still the beneficiary. The able opinion of the Vice Chancellor (Pitney) reviews the cases of *Supt. v. Heath,* 2 McCart. 22; *Shannon v. Hobo-*

ken, 10 Stew. 123; and *Bank v. Bayonne,* 3 Dick. 246, in which it had been intimated that an order, given on any owner by a builder, would take effect from the time of its presentation to the owner, and not from the time of its making, and concludes that no such rule was decided by those cases (which seems clearly true), and that it was not really intended to assert any such dictum (which seems probable). In *Burnet v. Jersey City,* 4 Stew. 341, it had been contended that an assignment of a chose in action could not be complete (in the sense in which equitable rules would require) until notice had been given to the debtor, but the court did not find it necessary to decide whether that contention was sound or not. There seems to have been no case, other than *Board of Education v. Duparquet,* in which the question has been carefully considered or necessarily ruled. In *Donnelly v. Johnes,* 44 Atl. R. 180, Vice Chancellor Grey, indeed, says that such orders are chargeable upon the fund, "in the order of their priority of service;" and in deciding both that case and *Flaherty v. Atlantic Lumber Co.,* 44 Atl. R. 186, he very obviously marshals the orders in accordance with the date of their presentation to the owner. So too, the Court of Errors, in *Smith v. Dodge & Bliss Co.,* 44 Atl. R. 639, makes the same intimation and pursues the same course in marshalling the orders; but it does not appear that the priorities as thus determined differed, in any of these cases, from what the date of issuance of the orders would have occasioned; nor is it probable, that the question in hand was then present to the mind of the Vice Chancellor, or of the Court of Errors.

In *United States Co. v. Newark,* 74 Atl. 192, Vice Ch. Howell followed and approved the doctrine of the *Duparquet* case, holding that it was the same doctrine that had been approved in the following cases:

Kennedy v. Parke, 2 C. E. Gr. 415; *King v. Berry,* 2 H. W. Green 44; *Bank of Harlem v. Bayonne,* 3 Dick. 246; *Miller v. Stockton,* 35 Vroom 614; *Cogan v. Conover Co.,* 3 Rob. 809.

The rule, as determined in *Board of Education v. Duparquet,* on the whole, seems, to be the correct rule; but the matter may be considered, perhaps, as still unsettled.

An assignment taken by a creditor, not in payment, but only to credit the proceeds when received, is a mere power to collect and apply, and if such assignment is subsequently returned by the assignee to the assignor, it then becomes cancelled. *South End Imp. Co. v. Harden,* 52 Atl. 1127.

ORDERS TO GENERAL CREDITORS of the contractor stand the same as orders given to materialmen or laborers. Both, whether accepted or not are equitable liens on the fund in the owner's hands. *McPherson v. Walton,* 15 Stew. 282; *Supt. v. Heath,* 2 McCart. 22.

AN ASSIGNMENT OF THE ENTIRE CONTRACT, assented to by the owner, and the subsequent completion of the work by such assignee, does not give to such assignee any rights or equities which the builder himself did not have at the time of such assignment. *Fell v. McManus,* 1 Atl. 747. Compare, *St.*

Peter's Church v. Van Note, 21 Dick. 78; *Evans v. Lower,* 1 Rob. 232.

PRIORITY. See post, under § 6, for the cases on the respective priority of orders and stop notices.

3. FILING PLANS AND SPECIFICATIONS. The cases on this subject are: *Ayres v. Revere,* 1 Dutch. 474; *Babbitt v. Condon,* 3 Dutch. 154; *Budd v. Lucky,* 4 Dutch. 484; *Hill v. Carlisle,* 14 N. J. L. J. 114; *Neill v. Watson,* 15 N. J. L. J. 138; *Pimlott v. Hall,* 26 Vroom 192; *Freedman v. Sandknop,* 8 Dick. 243; *La-Foucherie v. Knutzen,* 29 Vroom 234, decided before the amendment of 1895, and the following since decided: *Weaver v. Atlantic, etc., Co.,* 12 Dick 547; *Murphy, etc., Co. v. Nicholas,* 37 Vroom 414; *English v. Warren,* 20 Dick. 30; *Campbell Morrell Co. v. Lehocky,* 73 Atl. 515.

In *Ayres v. Revere,* Chief Justice Green, premising that "*one* design of requiring the contract to be filed must have been to apprise all mechanics and materialmen to what extent the building was exempt from liens and how far they must look to the responsibility of the builder alone for remuneration," held that the contract was not duly filed, because the contract stated that the builder was to do only a part of the work and furnish only a part of the materials mentioned in the specifications, and the specifications themselves, which were essential to determine what such part was, had not been filed. It was also noted that the contract in that case expressly made the specifications a part of it. In *Babbitt v. Condon,* the contract being to do all the work and furnish all the material, it was said that in such case the specifications formed no essential part of the contract with respect to its filing. The decision in this case was rested, also, on other grounds, which made it unnecessary to decide upon this question. In *Budd v. Lucky,* it was expressly decided that the specifications did not need to be filed when the contract was to do all the work and furnish all the material; and it was, in effect, considered that, to give notice of whether the material or work in contemplation was within or without the contract, was the *only* purpose of the statutory requirement that it be filed. In *Hill* v. *Carlisle,* and *Pimlott* v. *Hall,* the contract was partial, and it was held fatal that the specifications were not filed, following *Ayres v. Revere.* In *Neill v. Watson,* the contract being total, the failure to file the specifications was held of no consequence, and the same was held in *Freedman v. Sandknop* and *La Foucherie v. Knutzen,* following *Budd v. Lucky.* Then came the amendment of 1895, following which, in *Weaver v. Atlantic, etc., Co.,* it was decided that the failure to file the specifications was fatal, the contract there in question being similar to a partial contract. In the next case, *Murphy, etc., Co. v. Nicholas,* it was intimated that the rule adopted in *Budd v. Lucky* had been a piece of judicial legislation, rather than of rational interpretation; and doubts were expressed whether the specifications could ever have been properly dispensed with when the contract expressly made them a part of it. It was also intimated that the amendment of

1895 evinced a legislative intent that the document filed should show a complete contract. This latter intimation might have afforded some support for the contention that the whole legislative design of section 2, as amended in 1895, was broader than the purpose mentioned in *Ayres v. Revere,* as originally *one* of its designs, and that the purpose of the statute also is that the contract should be so completely filed as to apprise mechanics and materialmen of all the details necessary to enable them to ascertain with certainty the scope of the work which the builder has undertaken, and so that they may have, of record, the means of estimating whether the work is likely to be carried out and completed for the contract price or not. It might have been found that such was the reason which led the legislature to require the "specifications" to be filed in every instance, whether they were, or were not, essential "to apprise mechanics or materialmen to what extent the building was exempt from liens, and how far they must look to the responsibility of the builder alone for remuneration." That it is necessary to file the "specifications" in every case, since the amendment of 1895, was decided in *English v. Warren,* and to that extent, the old rule of construction was abrogated by the amendment. Why that should have been done is clear enough upon the hypothesis above suggested; but, on the contrary hypothesis, that the legislature did not intend to enlarge the design of the requirement as to filing the contract, it imposed an additional burden on the land owner, without intending any resulting advantage to any one else. In view of these considerations, and the course of decision on the subject, it might have been thought that the present requirement, that the specifications must be filed in every case, should be construed so as to make the term, "specifications," include all the particulars as to *the dimensions of the work,* as well as the particulars as to materials, qualities, workmanship and the like, which have, in fact, been agreed upon and *specified* between the parties. Such a construction would have made the drawings, or plans, as essential a part of the "specifications" as is the written or printed enumeration of particulars, and would have done no violence to the term, specifications. For, manifestly, a specification is to be defined as the designation of a particular, and a drawing or plan which furnishes the dimensions of the work, and of its various parts, is surely such a designation, and is usually, if not always, the only thing which does furnish a designation of those particulars. The term, "specifications," is an apt term to include all usual methods of designating or describing particulars, and includes drawings or plans just as much as it does writings. It is also to be noted that in very many cases the contract, or the written specifications, or both, recite, in express words, that the plans or drawings are part of the specifications, and very often that they are a controlling part. Without any such recital they are, in fact, an indispensable part thereof.

But *Dis aliter visum est,* the Court of Errors and Appeals, in *Campbell & Morrell Co. v. Lehocky,* has given a much more restricted meaning to the statutory term, specifications, holding

that it does not include the drawings or plans, and that the amendment of 1895, therefore, under the maxim, *Expressio unius est exclusio alterius,* indicates conclusively that while the written specifications must be filed in every case, the plans or drawings need not be. The report of this case does not show whether the plans or drawings were there expressly made a part of the specifications, although it is probable that they were. Perhaps it is henceforth immaterial on this question what the fact, in that respect, may be. There may still, however, be a doubt as to this when the contract is partial and the specifications, without the plans, do not suffice to show what is, and what is not, within such contract, see *Weaver v. Atlantic, etc., Co.,* 12 Dick. 547, at p. 551.

Careful practitioners will, we think, continue to advise owners that the drawings or plans be filed with the contract and the written specifications.

The foregoing note was prepared before the enactment of the act of 1910, p. 472, which reads as follows:

Whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract; provided, said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished; provided further, that it shall not be necessary to file the plans for such building in said clerk's office, whether such plans are referred to in said contract or not.

This amendment seems to set at rest any question as to filing the plans, but it has been thought best to let the above note stand, inasmuch as it may be useful as an historical resume of the course of legislation and the decisions upon the subject.

CONVEYANCE BY OWNER TO CONTRACTOR. If the contract is filed, a conveyance of the land and building, after its completion, by the owner to the contractor, if *bona fide,* will not give a laborer or material man a lien, *Scudder v. Harden,* 4 Stew. 503; but it is otherwise if the builder was, during all the time, the real owner; see *Young v. Wilson,* 15 Vroom 161.

4. Filing the contract operates to protect from liens for materials or labor furnished or performed after the date of filing; that is, the contract need not be filed before any work is begun, but, if it is not filed until after that time, will let in a lien for anything done before it is filed and be a protection as to the remainder. *Mechanics, etc., Assn. v. Albertson,* 8 C. E. Gr. 318; *La Foucherie v. Knutzen,* 29 Vroom 234. For a time (1892-1895), owing to the act of 1892, p. 358, it was necessary to file the contract before any work was begun or materials were furnished, *La*

Foucherie v. Knutzen, 29 Vroom 234; but the statute which produced this result was repealed in 1895.

The work done or materials furnished, before which the contract is to be filed, are such as are to be done or furnished under the contract. So, where the owner was, himself, to build the foundation, and contracted only for the superstructure, a claimant, who furnished work or materials for the superstructure, after the contract was filed, cannot have a lien, although the contract was executed before the foundation was completed. *Budd v. Lucky,* 4 Dutch. 484.

Recourse of employe or materialman against the contract price, on the contractor's failure to pay, after demand, refusal and notice.

3. Whenever any master workman or contractor shall, upon demand, refuse to pay any person who may have furnished *him* materials used in the erection of any such house or other building, or any *sub-contractor,* journeyman or laborer employed by him in erecting or constructing any building, the money or wages due to him,[1] it shall be the duty of such journeyman, laborer, materialman or *sub-contractor* to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded,[2] and the owner or owners of such building shall thereupon be authorized to retain the amount so due and claimed by any such journeyman, laborer, materialman or *sub-contractor* out of the amount owing by him or them on the contract or that may thereafter become due[3] from him or them on such contract for labor or materials used in the erection of such building,[4] giving the master workman or contractor written notice of such notice and demand; and if the same be not paid or settled by said master workman or contractor, such owner or owners, on being satisfied of the correctness of such demand, shall pay the same, and the receipt of such journeyman, laborer, materialman or *sub-contractor* for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such master workman or contractor, or his representatives or assigns, as so much paid on account.[5]

1905, p. 311, § 1; 1898, p. 538, § 3; 1853, p. 437, § 3; 1863, p. 275, § 2; Rev. 1874, § 3; 1895, p. 313, § 2.

The text above given is the section as amended by the Act of 1905, which changed the section by adding the italicized words and

omitting the definite article in one place. The insertion of the word, *him,* is significant, as is below, in note 1, noted. It is desirable, in many cases, to consider the various changes that have been made in this section, since it first was enacted as § 3 of the Act of 1835. To facilitate such an examination, we give in parallel columns the several enactments, omitting only that of the Revised Statutes of 1847, which copied the language of the Act of 1835, with no significant variation; unless the change from, master or workman, to master workman, might be thought such.

1835, p. 148, § 3.

Whenever any master or workman shall refuse to pay to any journeyman or laborer, employed by him, in the erection or constructing any house or other building, his wages, it shall be the duty of such journeyman or laborer, to give notice, in writing, to the owner or owners of such house or other building, of such refusal, and the amount due him or them, and so demanded, and the said owner or owners shall thereupon be authorized to retain the amount so due and claimed, by any such journeyman and laborer, out of the amount due by him or them to such master workman, and give notice to such master workman of such notice and demaud, and if not liquidated and paid by such master workman, such owner or owners, on being satisfied of the correctness of such demand, shall pay the same; and the receipt of such journeyman and laborer for the same, shall be a sufficient offset in the settlement of the accounts between such owner or owners of any house or other building, and such master workman.

1853, p. 437, § 3.

Whenever any master workman or contractor shall, *upon demand*, refuse to pay *any person who may have furnished — — materials used in the erection of any such house or other building*, or any journeyman or labored employed by him in the erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman or laborer to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded, and the owner or owners *of such building*, shall thereupon be authorized to retain the amount so due and claimed by any such journeyman or laborer out of the amount *owing* by him or them to such masterworkman *or contractor*, *giving* him written notice of such notice and demand; and if the same be not paid or *settled* by said masterworkman or *contractor* such owner or owners, on being satisfied of the correctness of such demand, shall pay the same, and the receipt of such journeyman *or* laborer for the same, shall *entitle such owner or owners to an allowance therefor*, in the settlement of accounts between him and such masterworkman *or contractor* as so much paid on account.

1863, p. 275, § 2.
Rev., p. 668, § 3.

Whenever any masterworkman or contractor shall, upon demand, refuse to pay any person who may have furnished — — — materials used in the erection of any such house or other building, or any journeyman or laborer employed by him in the erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman or laborer, *or materialman*, to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded, and the owner or owners of such building shall thereupon be authorized to retain the amount so due, and claimed by any such journeyman, laborer, *or materialman*, out of the amount owing by him or them to such masterworkman or contractor, giving him written notice of such notice and demand; and if the same be not paid or settled by said masterworkman or contractor, such owner or owners, on being satisfied of the correctness of such demaud, shall pay the same, and the receipt of such journeyman, laborer, *or materialman* for the same, shall entitle such owner or owners to an allowance therefor, in the settlement of accounts between him and such masterworkman or contractor, as so much paid on account.

1895, p. 313, § 2.

Whenever any masterworkman or contractor shall; upon demand, refuse to pay any person who may have furnished — — — materials used in the erection of any such house or other building, or any journeyman or laborer employed by him in the erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman or laborer or materialman to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded, and the owner or owners of such building shall thereupon be authorized to retain the amount so due and claimed by any such journeyman, laborer or materialman out of the amount owing by him or them to such masterworkman or contractor, *or that may thereafter become due from him or them to such masterworkman or contractor for labor or materials used in the erection of such building,* giving him written notice of such notice and demand; and if the same be not paid or settled by said masterworkman or contractor, such owner or owners on being satisfied of the correctness of said demand shall pay the same, and the receipt of such journeyman, laborer or materialman for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such masterworkman or contractor as so much paid on account.

1898, p. 538, § 3.

Whenever any masterworkman or contractor shall, upon demand, refuse to pay any person who may have furnished — — — materials used in the erection of any such house or other building, or any journeyman or laborer employed by him in the erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman or laborer or materialman to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded, and the owner or owners of such building shall thereupon be authorized to retain the amount so due and claimed by any such journeyman, laborer or materialman out of the amount owing by him or them on the contract, or that may thereafter become due from him or them on such contract for labor or materials used in the erection of such building, giving the masterworkman or contractor written notice and demand; and if the same be not paid or settled by said masterworkman or contractor, such owner or owners, on being satisfied of the correctness of said demand, shall pay the same, and the receipt of such journeyman, laborer or materialman for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such masterworkman or contractor, *or his representatives or assigns,* as so much paid on account.

1905, p. 311, § 1.

Whenever any masterworkman or contractor shall, upon demand, refuse to pay any person who may have furnished *him* materials used in the erection of any such house or other building, or any *subcontractor,* journeyman or laborer employed by him in — — — erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman, laborer, materialman, *or subcontractor* to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded, and the owner of owners of such building shall thereupon be authorized to retain the amount so due and claimed by any such journeyman, laborer, materialman *or subcontractor* out of the amount owing by him or them on the contract or that may thereafter become due from him or them on such contract for labor or materials used in the erection of such building, giving the masterworkman or contractor written notice of such notice and demand; and if the same be not paid or settled by said masterworkman or contractor, such owner or owners, on being satisfied of the correctness of said demand, shall pay the same, and the receipt of such journeyman, laborer, materialman *or subcontractor* for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such masterworkman or contractor, or his representatives or assigns, as so much paid on account.

By the act of April 12th, 1910 (p. 500), this third section was amended to read as follows, the only material change thereby made being the addition of the words which we have italicised:

Whenever any masterworkman or contractor shall, upon demand, refuse to pay any person who may have furnished him materials used in the erection of any such house or other building, or any sub-contractor, journeyman or laborer employed by him in erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman, laborer, materialman or sub-contractor to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded, *specifying said amount as nearly as possible,* and the owner or owners of such building shall thereupon be authorized to retain the amount so due and claimed by (— — — — —) such journeyman, laborer, materialman, or sub-contractor out of the amount owing by him or them on the contract or that thereafter may become due from him or them on such contract for labor or materials used in the erection of such building, giving the masterworkman or contractor written notice of such notice and demand, and if the same be not paid or settled by said masterworkman or contractor, such owner or owners, on being satisfied of the correctness of said demand, shall pay the same, and the receipt of such journeyman, laborer, materialman or sub-contractor for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such masterworkman or contractor, or his representatives or assigns, as so much paid on account.

PRIORITIES AS BETWEEN ORDERS AND STOP NOTICES, see post § 5.

PRIORITIES AS BETWEEN SUCCESSIVE STOP NOTICES, see post, § 5.

CONSTRUCTION OF THE SECTION. It is said by the Court of Errors and Appeals in *McNab, etc., Co. v. Paterson, etc., Co.*, 2 Buch. 929; s. c., 1 Buch. 133: "There is no reason for a strict construction of the provisions of this section (against the claimant and in favor of the owner of the land), beyond the inconvenience to which the owner is put by making inquiry into the correctness of the claims served upon him." "In our opinion no such strict construction should be given to the provisions of the third section." This does not mean, we take it, that the section can be construed liberally in favor of a claimant, or otherwise than in accordance with the "plain and usual meaning of its

words read in the light of its obvious design and clear requirements." See note 2, under the title of the act. See also *Supt. v. Heath,* 2 McCart. 22, in which Chancellor Green said: "It must be borne in mind that the statutory remedy must be strictly pursued; that the statute alters the existing law so far, and no furher, than its terms require, and that it cannot be extended by construction."

(*a.*)

1. WHO MAY BE A CLAIMANT. *Only a creditor of the builder can have the remedy provided by this section; it is not given to those who supply the builder's sub-contractor, or employe, with labor or materials or both.*

This was correctly said, by Vice Chancellor Van Fleet, in *Kirtland v. Moore,* 13 Stew. 106, to be the plain direction of the statute; although it does not appear that it was necessary to so hold in that case. In *Carlisle v. Knapp,* 22 Vroom 329, however, the question was definitely presented to the Court of Errors and Appeals and decided.

The sufficient reason for the decision, as was there intimated, is because the third section plainly gives its remedy only when the builder *refuses, upon demand, to pay* any person, materialman or otherwise, *the money or wages due to him;* and this language necessarily implies that such claimant must be one who is legally entitled to make such a demand upon the builder, as the debtor from whom his money or wages *are* due, and manifests that the legislative intention was that "the remedy provided by the third section is to extend only to creditors of the contractor with the owner" (the builder). Reviewing the previous course of legislation, whereby this remedy, originally given by the act of 1835 to such mechanics as were employes of the builder, and hence always his creditors, was extended, by the Revision of 1874 (following the act of 1863, p. 275), after the abortive attempt in that direction in the act of 1853, to "persons who may have furnished materials used in the erection of any such house or other building," it was concluded that the generality of those words, in legislation originating so loosely, could not defeat the obvious intention, elsewhere manifested in the section and above noted; and that the words, *"to such contractor,"* must be read into the section after the words, "may have furnished." It may be noted here that the amendment of 1905 adopts this reading, in effect, by the more economical insertion of the word, "him," instead of the words suggested by the Court of Errors and Appeals. That the decision in *Carlisle v. Knapp,* was perfectly sound, is apparent, not merely by this legislative adoption of the result; but because, in addition to what has already been noted, the section, as was there intimated, contemplates that the debt due the claimant shall be one which, when paid by the owner, shall entitle the latter, without the builder's assent, *to offset* (this is the exact term of the original act, it will be noted) against such builder, in the settlement of the accounts between them: and this would be a most startling, if not legally impos-

sible, thing, if the debt so paid to such claimant were not a debt due to him from such builder. *Carlisle v. Knapp,* to the point here in question, has been cited and followed or approved in *Bruce v. Pearsall,* 30 Vroom 62; *Building and Loan Assn. v. Williams,* 12 Dick. 503; *Brennan v. Industrial, etc., Assn.,* 17 N. J. L. J. 204; *Gardner & Meeks Co. v. N. Y., etc., R. R.,* 43 Vroom 257; *Fehling v. Goings,* 1 Rob. 375; *Beckhard v. Rudolph,* 2 Rob. 740.

(*b.*)

A GENERAL CREDITOR OF THE BUILDER for moneys loaned to him, although to enable him to carry out his contract with the owner, cannot have the benefit of this section, *Williams v. Bradford,* 21 Atl. 331 (Grey, V. C.); *Evans v. Lower,* 1 Rob. 232; so also a claim for tools supplied the builder is invalid, *Evans v. Lower,* supra.

(*c.*)

The ASSIGNEE OF A CLAIMANT, who might himself give notice (having an inchoate lien), may, perhaps, give notice; but should probably do so in the name of the assignor for his, the assignee's, benefit. See note to § 1, assignability of lien claim; and *South End Co. v. Harden,* 52 Atl. 1127.

(*d.*)

SUB-CONTRACTORS. As the third section stood before the amendment of 1905, it was held, in *Beckhard v. Rudolph,* 2 Rob. 740; reversing the contrary view of V. C. Stevenson, in s. c., 2 Id. 315; that an employe or a sub-contractor of the builder, who furnishes the latter with materials, and the labor of himself or servants, necessary to instal such materials in situ, can have the remedy by stop notice for the price of all that he has so furnished. The view of the Vice Chancellor was that the statute was not to be construed liberally in favor of the claimant and against the owner, but vice versa; and that such claimant was neither a laborer nor journeyman, employed by the builder, nor a person who furnished him materials, so far as the labor and work of installing them in situ was concerned. By way of illustration, he instanced the case of a sub-contractor who should furnish labor only, as in the case of a mere purveyor of labor, an engineer contracting to make measurements and set stakes for the builder, a bricklayer undertaking to lay brick to be supplied by the builder, and the like. In the case of *McNab, etc., Co. v. Paterson, etc., Co.,* 1 Buch. 133, such a claim was presented for decision to the same Vice Chancellor, under the unamended wording of the section; and he held that such claim, being the claim of a sub-contractor who had excavated the cellar, with his teams and laborers for the builder, at a price per cubic yard, was invalid. No deliverance on that subject has as yet been made in the Court of Errors and Appeals beyond the remark, in *Beckhard v. Rudolph,* 2 Rob. 740 (at p. 745), that if such claims are not valid, "it must be on the ground that with respect to claims for mere labor performed, the benefit of § 3 is (was) by its

terms restricted to any journeyman or laborer employed by him (the contractor), etc." Although the *McNab* case went to the Court of Errors and Appeals and was affirmed, there was no appeal taken from the decision of the point at present under consideration; the matter that was decided in that court being the affirmance of the Vice Chancellor's allowance of claims of sub-contractors for materials furnished and labor in installing them in situ, under the rule settled in the *Beckhard* case, which was re-affirmed. *McNab, etc., Co. v. Paterson Co.*, 2 Buch. 929. As was said by the Vice Chancellor in the *McNab case*, 1 Buch. 133, at page 155, the section, as amended in 1905, now plainly gives a sub-contractor the remedy, whatever the character of his contract may be; although the legislature carelessly has failed to make the necessary corresponding changes in the wording of other sections, notably the fourth section.

(*e.*)

MAY CLAIMANTS WHO CAN FILE A LIEN ALSO GIVE STOP NOTICE? In *Summerman v. Knowles*, 4 Vroom 202, an action at law was brought against the owner by a materialman upon his stop notice, and the declaration failed to aver that the contract was in writing and filed. It was held that the declaration was fatally defective, because of such omission, because the word, *such*, in the phrase, "any person who may have furnished materials used in the erection of *such* house, etc.," must be referred, for its antecedent, to the phrase in the second section, "any building erected in whole or in part, by contract in writing," as qualified by the requirement that such contract be filed: and that, therefore, the right to resort to the remedy by stop notice, in the case of a materialman, can exist only when he is, by the filing of the contract, deprived of a right to file a lien claim. It will be noted that the language of the third section, from the beginning to the present time, omits this important word, *such*, in the clause which gives journeymen and laborers (and now sub-contractors) the right to a stop notice, and confers it upon them simply, if employed by the builder "in erecting or constructing *any* building."

Notwithstanding this very material difference in wording, it has been said in several cases, *Carlisle v. Knapp*, 22 Vroom 329; *Frank v. Freeholders*, 10 Vroom 347; *Beckhard v. Rudolph*, 2 Rob. 740; and plainly held in one, *Weaver v. Atlantic Roofing Co.*, 12 Dick. 547, that no person can have the remedy, by way of stop notice, unless the owner's contract has been duly filed. The only point decided in the *Carlisle* case was that a person who furnished a sub-contractor materials could not give notice, because the obvious purpose of the third section is to provide a remedy only for creditors of the builder. In the *Frank* case, the action was a suit at law upon a notice, given to the owners of a building, designed for public use (county buildings), by a sub-contracting painter who furnished his materials and applied them. It was intimated that, on grounds of public policy no right of lien could be enforced, if it could exist, against such a building; but

as the contract with the builder had been filed, it was held that the claimant should have judgment; Justice Dixon dissenting on the ground that no lien could exist upon such buildings, and that the filing of the contract could operate to give a remedy, under the third section, only when it cut off a lien that otherwise could have existed under the first section. In the *Weaver* case it *was* plainly held (by Vice Chancellor Grey) that where the building contract is not filed (in this case it was insufficiently filed), *laborers* as well as materialmen, cannot have the remedy by stop notice; since they may have a lien on the building under the first section. In the *Beckhard* case the question in hand was not presented for decision; but it was said, arguendo, that "it has been repeatedly held that the remedy by stop notice is confined to those who are prevented from having a lien upon the building by reason of the filing of the contract."

With these decisions in mind, Vice Chancellor Stevenson, in *McNab, etc., Co. v. Paterson, etc., Co.*, 1 Buch. 133, points out that the original enactment of this third section in 1835 gave *laborers* and *journeymen* this remedy, by way of stop notice, whether the building contract was filed or not; that when it was *not* filed they had both remedies, a lien upon the building, and the right of recourse to the fund by stop notice; that it has been assumed that the workman's remedy, by stop notice, like that of the materialman, is now confined to the case when the building contract has been filed, but that the point is not discussed in the cases and the legislation which effected such a change has not been indicated; but that, by the amendment of 1905, especially by placing a sub-contractor (as it does) in the same class with journeymen and laborers, and not in the class with mere materialmen, it is, perhaps, indicated that the stop notice can now be employed by no one, if the owners contract has not been filed.

It seems plain that not this, but quite a contrary conclusion is warranted by the Vice Chancellor's premises. For if, prior to the amendment of 1905, journeymen and laborers had a right to the remedy by stop notice when the contract was not filed; that amendment has not diminished their right, by merely giving it also to such materialmen, or others, as may be sub-contractors employed by the builder, which is all that the amendment does; but has enlarged the rights of such materialmen, and given a new right to such others.

There may, however, be a question, as to whether journeymen or laborers had such a right prior to the amendment of 1905. As noted already, the *Weaver* case is a *decision* in point, to the effect that they had not; but that decision obviously passed the point now in question sub silentio, and without due attention to, or consideration of, the matter. In all the other cases above-cited, the point was not ruled at all. It is possible that there may be other cases like the *Weaver* case, which have actually ruled a laborer's claim to be invalid because the contract was not filed (was *English v. Warren*, 20 Dick. 30, such a case?); but if so, it is quite certain that they too have passed the matter,

like that case, without due consideration; and that a reference to the history of this legislation would show, as Vice Chancellor Stevenson has elaborately pointed out, in the *McNab* case, that the contrary was originally, if it be not still, the law.

The solution of the question thus raised, perhaps, depends upon whether the reasoning in *Summerman v. Knowles,* supra, exhausts all the possible grounds upon which that decision could have been rested. If the reason there given was the only reason upon which the third section could then have been construed as denying a materialman a right, by stop notice, when the contract was not filed, it is the only reason now, and that being so, the court must then have construed that section, and must now construe it, as giving to laborers and journeymen (and now sub-contractors) the very right that it denied to materialmen; for the right of the latter was (and still is) given only for materials furnished for any *such* house, while the right of the workman is given when he has been employed upon *any* building.

The Court of Errors and Appeals, in *Carlisle v. Knapp,* 22 Vroom 329, concluded that the legislature did not intend to give to materialmen generally, but only to such of them as are creditors of the builder, the remedy by stop notice, as we have above seen; because such intent was to be gathered from the history of the legislation and the general object of the section, as well as from its terms and the procedure it requires; and so concluded that the words, "to such contractor," must be read into the section. Perhaps there may be grounds upon which the court may conclude that the phrase, "employed by him in the erecting or constructing any building," must be read as though it said "any *such* building;" but, if not, it is difficult to see how the conclusion can be avoided, that journeymen and laborers, and now sub-contractors, employed by the builder, can have the remedy by stop notice, whether a contract is filed or not; but that materialmen, who are not also such sub-contractors, cannot.

(*f.*)

It may be here noted that WHERE THE CONTRACT, AS FILED, FALSELY STATES THE PRICE, as at $5,100 when the real price was $4,100, its filing may be treated as a nullity or otherwise, at the election of the claimant, who may, therefore, have either a lien or the remedy by stop notice, accordingly as he so elects. *Murphy v. Nicholas,* 49 Atl. 447.

(*g.*)

It may be also again noted that, in the case of BUILDINGS FOR PUBLIC PURPOSES, while there can be no lien enforced against them, a mechanic or materialman may have the remedy of a stop notice, if the contract be filed. *Frank v. Freeholders,* 10 Vroom 347; and such remedy is concurrent with, and not excluded by, the remedy also given by the act of 1892, p. 369. *Delafield v. Sayre,* 31 Vroom 449; *Camden v. Camden,* 47 Atl. 220; *Garrison v. Borio,* 47 Atl. 1060; *Norton v. Sinkhorn,* 48

Atl. 822; s. c. 50 Atl. 506; *Hall v. Jersey City,* 50 Atl. 603; *Kelaher v. English,* 50 Atl. 902; *Arzonico v. West New York,* 69 Atl. 450.

2. THE STATUTORY REQUIREMENTS MUST BE STRICTLY PURSUED. *Supt. v. Heath,* 2 McCart. 22.

The claimant must be able to show: 1. That the alleged owner has some estate or interest in the land upon which a building is being, or has been, erected. 2. That a building, or some part thereof, is being or has been erected, or constructed, thereon pursuant to a written contract which has been filed. 3. That the claimant is a creditor of the building contractor, for work done, or materials furnished, or for both. 4. That such work or materials were used in the erection or construction of such building. 5. That the claimant has demanded his debt of the builder. 6. That such debt was due before such demand was made. 7. That the claimant demanded no more than was due him. 8. That the builder refused to pay, upon such demand. 9. That the claimant has given the owner notice in writing "of such refusal and of the amount due to him and so demanded." 10. That the owner is satisfied that the claim is correct.

These various requirements will now be considered in order, so far as they are not elsewhere dealt with, in which case proper reference will be made.

1.

THE ALLEGED OWNER MUST HAVE SOME INTEREST OR ESTATE IN THE LAND. This seems to be the ruling of the Court of Errors and Appeals, in *Gardner & Meeks Co. v. Herold,* 72 Atl. 24. In that case the contract was made by a woman's husband for the erection of a building on her land; in which, under the decision in *Porch v. Fries,* 3 C. E. Gr. 204; app., in *Trade Ins. Co. v. Barracliff,* 16 Vroom 543, the husband had no estate or interest. It was held that the plain words of the statute require that the notice be served upon the owner of the building, and that no one could be the owner of the building on another's land, "if he had no estate whatever which would enable him either to enjoy the use of the building, or to sell or remove it."

See also under § 2, note, owner's signature to contract; also under § 1, note, estate of owner.

2.

THERE MUST HAVE BEEN A CONTRACT WHICH HAS BEEN FILED. There may be a doubt as to whether this is always so or not. See previous note, *may claimants who can file a lien also give a stop notice,* where the matter is considered at length.

3.

THE CLAIMANT MUST BE A CREDITOR OF THE BUILDER for work done or materials furnished, or for both.

See for a full consideration of this, our previous note, *who may be a claimant.*

4.

THE WORK OR MATERIALS MUST HAVE BEEN USED IN ERECTING THE BUILDING.

The statutory words, "for labor or materials used in the erection of such building" seem plainly to be an adjunct to the previous words, "due and claimed by any such journeyman, laborer, materialman, or sub-contractor;" and, therefore, limit the right of the claimant to give notice only of a debt which is due therefor. It was contended in *McNab, etc., Co. v. Paterson, etc., Co.,* 2 Buch. 929, that the notice must state that the materials, etc., were used, etc., and, in holding that the notice need not so state, it was said: "The notice was: This is to notify you that I have sold to the Paterson Co. for your building on Straight street, materials to the amount of, etc. This is, in effect, an averment that the materials were used in the building. That such was the case, in point of fact, is settled by, etc." In the same case, in the court below, 1 Buch. 133, at page 150, it is said that a failure to show that the materials, etc., have been *used* in the building would defeat the claimant's lien on the fund. See also *Beckhard v. Rudolph,* 2 Rob. 740; rev. s. c. 2 Id. 315.

5.

THE CLAIMANT MUST MAKE DEMAND UPON THE BUILDER.

See post in this note § 9 as to the allegation of a demand in the claimant's notice.

See *Adams v. Wells,* 53 Atl. 610.

PROVING DEMAND. The presentation of a bill to the builder, who has no money with which to pay it, coupled with the claimant's statement to such builder that the former is going to give the owner notice of his claim, and the fact that the correctness of the claim was undisputed, and that the builder then said he could not pay it, is sufficient proof of a demand and refusal. *Evans v. Lower,* 1 Rob. 232. So when the contractor abandons the contract before his sub-contractor has completed his work, and gives the latter a written agreement, rescinding the sub-contract as to the work not completed and fixing the amount due for the work done, and this is done because the contractor cannot proceed because unable to pay, there is a sufficient demand and refusal. *South End Co. v. Harden,* 52 Atl. 1127.

The claimant need not make the demand in person, neither need he give any *written* authority to the one who does so. *Fehling v. Goings,* 1 *Rob.* 375.

A demand for less than is due may be tantamount to a demand for all that is due. *South End Co. v. Harden,* 52 Atl. 1127.

6.

THE CLAIMANT'S DEBT MUST BE DUE BEFORE HE DEMANDS IT.

A claimant's proof fails when his demand was made before his whole bill became due, although it did all become due before he served notice on the owner. *Kirtland v. Moore,* 13 Stew. 106; *McPherson v. Walton,* 15 Stew. 282; *Bowlby v. Willison,* 11 N. J. L. J. 42; *Hall v. Baldwin,* 18 Stew. 858; *Flaherty v. Atlantic Co.,* 44 Atl. 186; *Donnelly v. Johnes,* 44 Atl. 180; *Reeve v. Elmendorf,* 9 Vroom 125; *Adams v. Wells,* 53 Atl. 610.

For the case when the builder rescinds a sub-contract before it is completed see ante in this note, § 5. *South End Co. v. Harden,* 52 Atl. 1127; *Evans v. Lower,* 1 Rob. 232.

TAKING A NOTE operates to postpone the accrual of the claimant's debt during the running of the note, *McPherson v. Walton,* 15 Stew. 282; even although the note is not accepted as payment of the debt, *Fry v. Patterson,* 20 Vroom 612; *Kirtland v. Moore,* 13 Stew. 106; *Taplor v. Wahl,* 43 Vroom 10; but taking judgment on his claim has no such effect, *Anderson v. Huff,* 4 Dick. 349; nor does the fact that he has obtained an order from the builder on the owner, *Dunn v. Stokern,* 16 Stew. 401; and see under § 1, note 3.

7.

THE CLAIMANT'S DEMAND MUST NOT BE FOR MORE THAN IS THEN DUE HIM.

In determining the amount of the debt due, all just credits must be deducted, *Flaherty v. Atlantic, etc., Co.,* 44 Atl. 186; and the account must not include any item of work or materials which are not properly part of the work undertaken by the builder, in his contract. *McPherson v. Walton,* 15 Stew. 282. The claimant may give notice for a less sum than that which is due him, in which case he will be deemed to have waived his claim against the fund for the excess. *Donnelly v. Johnes,* 44 Atl. 180; *South End Co. v. Harden,* 52 Atl. 1127. But it will be fatal for him to demand anything beyond the sum which is due him, *Reeve v. Elmendorf,* 9 Vroom 125; *Kirtland v. Moore,* 13 Stew. 106; *McPherson v. Walton,* 15 Stew. 282; *Hall v. Baldwin,* 18 Stew. 858; *Flaherty v. Atlantic Co.,* 44 Atl. 186; *Donnelly v. Johnes,* 44 Atl. 180; even although the excess is but a small amount. *Hall v. Baldwin,* 18 Stew. 858 (E. & A.); *Adams v. Wells,* 53 Atl. 610.

We had supposed that the rule as above stated had been firmly settled; but in the late case of *Evans v. Lower,* 1 Rob. 232, it was held by Vice Chancellor Reed, that a claim was good; although the amount demanded (and specified in the notice) was excessive, by reason of the inclusion of non lienable items for tools supplied and money loaned; and that, as the whole amount so demanded was in fact due the claimant, and the non lienable items were included in the demand and notice in good faith, though by mistake, the claimant was entitled to be paid the amount demanded, less such items. Again in *Taylor v. Wahl,* 40 Vroom 471, Justice Fort, speaking in the Supreme Court said, at page 473: "If it appear ——— that the claim ——— is excessive, to the knowledge of the claimant, the claimant cannot recover anything, and the owner is entitled to a verdict. The prin-

ciple, controlling in such a case as this, is the same as that declared by the Court of Errors and Appeals to apply where a notice to hold back is given to a city by a claimant against a contractor upon work under a public contract. (Citing) *Camden Wks. v. Camden,* 19 Dick. 723."

The case cited was a case arising under the act of 1892, p. 369. That act, in its first section, gives a lien to every laborer, etc., upon the moneys in the control of the municipality, upon his complying with its second section. In § 2, it provides that such claimant shall, inter alia, file a verified statement of "the amount *claimed, from* whom due, and if not due when it will be due, giving the amount of the demand after deducting all just credits and offsets." In section 5, it provides "that the lien shall attach from the time of filing thereof." It will be evident, upon the most cursory reading of its provisions, that this act expressly contemplates that the lien, which it gives, may be called into existence, by filing said verified statement, before there is anything *due* the claimant; and, that it, therefore, contemplates, by necessary inference, that such statement shall be effective to call the lien into being, although it may be difficult, or even impossible, to state therein the precise amount which will be due such claimant. As a consequence, it was necessarily held that the claimant, under this act, does not lose his lien by an erroneous statement of the amount claimed, unless he has knowingly and consciously over-stated it. *Camden Iron Works v. Camden,* 15 Dick. 211; s. c. aff. 19 Dick. 723; *Garrison v. Borio,* 10 Dick. 236; *Hall v. Jersey City,* 17 Dick. 489; s. c. aff. 19 Dick. 766.

But a very different rule, as is above pointed out, has been adopted in respect of the requirements of the third section of the mechanic's lien act, and that rule, adopted upon grave consideration, has been followed and applied in numerous cases for many years. It is, therefore, questionable whether the decision in *Evans v. Lower* was sound; and it is pretty clear that the expression in *Taylor v. Wahl,* which was obiter, was also an inadvertence. See also note 4 to § 2 of the act of 1892 post.

Since the foregoing note was written, the act of 1910, p. 500. has been passed, amending the third section so as now to require the claimant to give notice of the amount due to him, *"specifying said amount as nearly as possible."* It may be said, with much force, that an amount can never be said to be due which is not at the same time capable of exact ascertainment and statement; and that, hence, the amendment has altered the section in no respect.

We imagine, however, that it will be urged, and probably be held, that hereafter a notice will be good, notwithstanding an overstatement of the amount actually due, when it appears that the claimant has not wittingly intended any fraud and has exercised all the care, in ascertaining and stating the amount, which our familiar friend, the reasonably prudent man, ought, under all the circumstances of the particular case, to have exercised.

If this view be adopted, there will be little likelihood that a

notice will ever be found to be bad, in an action at law, because of an over-statement of the amount due; provided the good and lawful twelve are entrusted with the duty of determining the question: and the legislature might as well have enacted that no notice of claim shall be held to be bad for an over-statement of the amount due; unless it be made with a palpably fraudulent intent, or under circumstances which unmistakably indicate that the claimant has made no attempt, in good faith, to state, with precision, the amount due to him.

In the policy that underlies this sort of legislation, the unfortunate owner, who has the scot to pay, does not seem to be regarded with much consideration; but his embarrassments are unworthy of serious regard, and it is notorious that thrift is greatly promoted by every device that discourages the exercise of it.

8.

THE BUILDER MUST HAVE REFUSED UPON DEMAND, TO PAY.

See the cases below cited to the point that the claimant's notice must state such refusal, which, of course, must be the statement of a fact.

If the claimant demanded less than his due it is a good demand; and a refusal to pay upon such demand may be a refusal to pay all that the builder owes such claimant. *South End Co. v. Harden,* 52 Atl. 1127.

As to what is sufficient proof of a refusal, see *Evans v. Lower,* 1 Rob. 232; *South End Co. v. Harden,* 52 Atl. 1127, ante, this note § 5.

See also *Adams v. Wells,* 53 Atl. 610.

9.

THE CLAIMANT MUST GIVE THE OWNER NOTICE IN WRITING OF SUCH REFUSAL AND OF THE AMOUNT DUE TO HIM AND SO DEMANDED.

FORM OF NOTICE. The notice is not a pleading and need not have the certainty which a pleading must have. It may be in any form which in effect gives the written notice which the statute prescribes. *McNab, etc., Co. v. Paterson, etc., Co.,* 1 Buch. 133; *Fehling v. Goings,* 1 Rob. 375. It may consist of several papers taken together, such as an order, an assignment and a notice. *McNab, etc., Co. v. Paterson Co.,* 2 Buch, 729; aff. s. c., 1 Id. 133. It may be addressed to the wrong person if it be in fact served upon the right one; or it may misname the builder if it sufficiently identify him so that the owner is not misled. *Gardner & Meeks Co. v. Herold,* 72 Atl. 24, settling doubts expressed in *Beckhard v. Rudolph,* 2 Rob. 315. So also is *McNab, etc., Co. v. Paterson, etc., Co.,* 2 Buch. 729, aff. s. c., 1 Buch. 133.

SIGNATURE. A signature by one partner for the firm is good. *Williams v. Bradford,* 21 Atl. 331. The claimant's name may be signed by his agent or attorney, without any written authority therefor. *Fehling v. Goings,* 1 Rob. 375, explaining *Foster*

v. Rudderow, 3 Atl. 694, as not deciding otherwise. A corporate claimant's notice need not be under seal nor need its agent who signs it have express or written authority. *Flaherty v. Atlantic Co.,* 44 Atl. 186. It may not need any signature at all, if it give the owner the requisite information in some authentic way. *Fehling v. Goings,* supra.

ESSENTIAL CONTENTS. It must set forth two things: 1. The amount of the debt due the claimant. 2. That the builder has refused to pay. These are said to be the only things which it must set forth. *McNab, etc., Co. v. Paterson, etc., Co.,* 1 Buch. 133; *Fehling v. Goings,* 1 Rob. 375.

STATEMENT OF AMOUNT DUE. It is probably fatal if the notice over-state the amount really due. See cases cited in this note under § 7. It is undoubtedly fatal if it state no amount at all, or if the debt was not due until after notice was given or demand made. See this note, § 6.

STATEMENT OF REFUSAL TO PAY. It must, of course, set forth the builder's refusal. Thus it has been held that it is not sufficient for it to state that the builder neglected to pay on demand, *Hall v. Baldwin,* 18 Stew. 858; and so that it is not equivalent to the statement of a refusal to write: "I can't seem to get a settlement with the builder, Mr. J." *Donnelly v. Johnes,* 44 Atl. 180. See also *Bowlby v. Willison,* 11 N. J. L. J. 42; and cases cited ante in this note, § 5.

STATEMENT OF DEMAND. It has been held that the notice must set out that payment has been demanded. *Donnelly v. Johnes,* 44 Atl. 180; but it was held in *Beckhard v. Rudolph,* 2 Rob. 740; rev. s. c., 2 Id. 315, that a notice which sets out a certain sum as due for materials used, etc., and that the builder has refused to pay the money so due sufficiently states a demand, since refusal implies a previous demand or request for payment: and in *Fehling v. Goings,* 1 Rob. 375, it was held that the notice need not state that payment has been demanded. So also it was said in the *McNab* case, 1 Buch. 133, that the statute does not require that the notice shall set forth any demand made.

SERVICE OF NOTICE. A stop notice may be effectively served by the claimant or by his attorney, or agent. Such agent or attorney needs no written authority. *Fehling v. Goings,* 1 Rob. 375.

10.

THE OWNER MUST BE SATISFIED OF THE CORRECTNESS OF THE CLAIM.

See note 5 post; also *Evans v. Lower,* ante in this note, § 5.

3. EFFECT OF NOTICE is to assign, pro tanto, to the claimant the right of the builder in the fund, *Wightman v. Brenner,* 11 C. E. Gr. 489; *Anderson v. Huff,* 4 Dick. 349. In some cases it was doubted or denied that such assignment extended, as well to what is to grow due, as to what is due, when the notice is served, *Kirtland v. Moore,* 13 Stew. 106; *Craig v. Smith,* 8 Vroom 549; *Bowlby v. Willison,* 3 N. J. L. J. 42; and see, *Shannon v. Hoboken,*

10 Stew. 123, 318; *Lanigan v. Bradley, etc., Co.,* 5 Dick. 201; *Board of Ed. v. Duparquet,* 5 Dick. 234; *Chosen Freeholders v. Lindsley,* 14 Stew. 189, 195; *Burnett v. Jersey City,* 4 Stew. 341, 351; but these cases were subsequently overruled, in this respect, and it was settled that a stop notice operates both on that which is due and that which is to grow due, *Mayer v. Mutchler,* 21 Vroom 162; *Budd v. Trustees,* 22 Vroom 36; *Anderson v. Huff,* 4 Dick. 349; *Donnelly v. Johnes,* 44 Atl. R. 180; *Booth v. Kiefer,* 47 Atl. R. 12; and, in *Donnelly v. Johnes,* supra, it was said, that such notices must be satisfied out of the next installment becoming due to the contractor, after their service, and if they are not completely satisfied by it, they apply to the next installment, as to the residue, and so on until the final installment is disposed of.

It will be noticed that the legislature by the amendment made in 1895 has embodied the construction of the statute, just above noted, in its express terms.

If the builder has agreed to take his pay in land, the claimant, under a stop notice, acquires an equity to be paid out of such land. *Anderson v. Huff,* 4 Dick. 349; but in any case, the claimant's right against the fund must, of course, be limited to such part of it as has been earned by the builder, or for his account. *Mayer v. Mutchler,* 21 Vroom 162; and the owner's right to retain the moneys earned by the contractor until the completion of the building, and then to make deductions for delay in the work, or for the cost of completing it is available to him as much against claimants as against the contractor. *Reeve v. Elmendorf,* 9 Vroom 125; *Bernz v. Marcus Sayre Co.,* 7 Dick. 275.

AS AGAINST THE BUILDER'S SURETIES, who have completed the work which he has *abandoned,* in order to protect themselves, the rights of claimants by stop notice, are postponed both as to a retained percentage that had been earned by such contractor, and the balance of the contract price; until such sureties have been reimbursed by their expenditures. *St. Peter's Church v. Van Note,* 21 Dick. 78. This is because nothing is due such contractor until, the sureties have completed their undertaking, and have been paid for it. But where the sureties merely furnish to the builder the materials and labor with which to finish the work, although he is insolvent and unable otherwise to complete it; they have no superior equity therefor, and the money becomes due the builder, as the work progresses, and is subject to claims by stop notice. *Evans v. Lower,* 1 Rob. 232; compare *Fell v. McManus,* 1 Atl. 747.

AS TO A TRUSTEE IN BANKRUPTCY, a stop notice is not a "legal proceeding" within § 67, ¶ f of the Bankrupt Act, which avoids all liens obtained through legal proceedings. Those words mean proceedings in a court of justice. Neither is it such an assignment as is invalidated by that section, nor is it a transfer by the builder so as to be void because put in within four months before his bankruptcy. *Fehling v. Goings,* 1 Rob. 375.

4. LABOR OR MATERIALS USED. As to this, see ante, note 2, to this section, § 4.

5. ACTION AT LAW. A claimant can bring an action at law against the owner, but not if the latter has reasonable cause to dispute his claim. *Reeve v. Elmendorf,* 9 Vroom 125. This does not mean merely that a plea, that the amount demanded in the notice is excessive, is a good plea in bar; although that also is true, since the claimant cannot have judgment for a sum less than he has demanded of the builder, *Reeve v. Elmendorf,* supra; but even if the claim is not excessive the claimant cannot have a verdict, if he fails also to aver and prove that, before suit begun, the owner was in fact satisfied of the correctness of his demand. When the claimant cannot show those facts, his only safe course is to first verify his claim by a judgment against the builder, although such judgment will not conclude the owner. *Reeve v. Elmendorf,* supra.

By virtue of § 4, the claimant must so verify his claim in any case when notified, under that section, to do so; but, in the absence of such notice, the mere fact, that the builder disputes the correctness of his claim, will not preclude the claimant from beginning suit against the owner; if he can show that his claim is in fact correct, and that the owner is satisfied that it is. And this he may establish by showing that such owner *ought* to have been so satisfied; although he may not be able to show that the owner admitted the fact so to be, and even in the face of the latter's expressed dissatisfaction, if such expressed dissatisfaction can be shown to have been without foundation and merely captious. *Reeve v. Elmendorf,* supra.

JURISDICTION. The statute does not limit the claimant to any particular court, and he may therefore bring his action in any of the courts of law. Thus, in *Summerman v. Knowles,* 2 Vroom 202, the action was begun in the small cause court, and taken, by appeal, to the common pleas; in *Taylor v. Reed,* 52 Atl. 579, it was begun in the district court; in *Craig v. Smith,* 8 Vroom 549; *Reeve v. Elmendorf,* 9 Vroom 125; *Mayer v. Mutchler,* 21 Vroom 162; and *Blauvelt v. Fuller,* 48 Atl. 538, suit was begun in the circuit court; while, in *Taylor v. Wahl,* 40 Vroom 471, it was begun in the Supreme Court.

WHEN SUIT MAY BE BEGUN. Although the stop notice impounds moneys to grow due, as well as those already due, yet suit cannot be begun against the owner until there is money due the contractor, *Craig v. Smith,* 8 Vroom 549; *Mayer v. Mutchler,* 21 Vroom 162; and therefore a claimant cannot have an action against the owner unless the contractor could have recovered, either on the contract or a quantum meruit, had there been no stop notices. *Mayer v. Mutchler,* supra. So if, on a dispute between the owner and contractor, it is submitted to arbitration to determine whether the contract has been properly performed, etc., the owner would not be liable to suit until after an award is made against him. *Booth v. Kiefer,* 47 Atl. R. 12.

But the claimant, when he is entitled to sue the owner at all,

may sue on a quantum meruit, for the partial performance of an entire contract which by no fault of his has not been completed. *Reeve v. Elmendorf,* 9 Vroom 125.

In *Crane v. Belfatto,* 69 Atl. 1085, a materialman served a notice before anything was due the builder. After that he consented that the owner pay the builder $200, the first payment which the latter had then more than earned. The balance of the contract price was $600, and the claimant's bill was $300. The owner paid the builder $500, instead of the $200, and the latter then quit, and it cost the owner $250 to finish the building. Held that the claimant was entitled to judgment against the owner, inasmuch as he should have had $600 with which to finish the building and pay the claimant.

PLEADING. The claimant in declaring should study the statute in connection with the several matters set forth in the preceding note 2, §§ 1-10. It was held in *Summerman v. Knowles,* 4 Vroom 202, that the declaration must allege that the building contract was in writing and filed. It is intimated in *Gardner & Meeks Co. v. Herold,* 72 Atl. 24, that the defendant must be the owner of some estate or interest in the land upon which the building is erected. It may be unnecessary to allege that such was the fact, but it would be wise to do so, and it would certainly be good pleading. The various other particulars, set forth in the note above referred to, should each be appropriately alleged.

It is said, obiter, in *Gardner & Meeks Co. v. Herold,* supra, that the defendant owner may plead that the value of the land and building is lses than the sum of the stop notices; and thereby restrict the judgment to a judgment specially to be satisfied out of the property. That case was an action at law upon a stop notice served upon a married woman, who was the defendant, upon whose lands a building had been erected, with her knowledge, under a contract made by her husband in his own name, as owner, and duly filed, but without in any way indicating that the wife was the real party to the transaction as owner. The husband had no estate or interest in the land. It was held that the action against her would lie, and the opinion, quite obviously, seeks to put that holding upon a basis that takes no particular account of the fact that the defendant was a married woman. We have considered the case, and the previous case of *Earle v. Willetts,* 27 Vroom 334, rev. s. c., sub nom *Willetts v. Earle,* 24 Vroom 270; and *Neill v. Watson,* 15 N. J. L. J. 138, in our previous note 1 to § 2 of the statute. As there noted, the action is well adjudged to lie against the married woman owner, in such a case, because the statute (§ 13) makes her the notoriously known real party to the contract, as owner, and so entitled to the benefit of the filing of the contract, on the one hand, and consequently subject to answer to claimants giving her notice. But unless the provisions of § 7, as construed in numerous cases in the Court of Chancery, the Supreme Court, and the Court of Errors and Appeals, are to be disregarded; any other than a married woman owner, who has not consented in writing that his lands shall be lienable for the erection of a building thereon, cannot need to invoke

the filing of the contract for such erection to protect his lands from lien therefor; unless he is the real party as owner to such contract, although not disclosed as such therein. Of course, if he has so consented that his lands shall be lienable, the remedy against him is by lien claim and suit to enforce the same, and not by stop notice. Hence, it seems clear that in every action at law upon a stop notice, the defendant owner, if liable at all, must be so liable because he has, in law, been the one who contracted for the erection of the building, whether as the known, or as the undisclosed, principal: and this being so, his liability to claimants upon stop notice must be a liability to answer to them to the extent of the unpaid contract price due to the builder, and not otherwise. Manifestly a special plea that the land and building are worth less than the notices, would confess the plaintiff's declaration without avoiding it.

A plea that at the time the notice was served the builder owed the claimant less than the amount claimed in the notice and demand is a good plea in bar. *Taylor v. Wahl,* 40 Vroom 471. Such a plea is, in effect, a denial of a material allegation of the declaration, and the matter of it could be given in evidence under the general issue, as the action at law upon a stop notice is necessarily an action on the the case upon an implied assumpsit. Strictly by the rules of pleading, such a special plea would be bad on special demurrer (motion to strike out), as amounting to the general issue, but there is a tendency observable to discourage such motions, as savoring of undue technicality.

It is pertinent to observe that if it be not fatal for the claimant's notice and demand to specify too large an amount, as the amount due, when the excess is the result of honest mistake; the fact of such honest mistake would be a good reply to such a special plea. As has been above noted (note 2, § 7), we think an excessive claim is always fatal. As said in *Reeve v. Elmendorf,* 9 Vroom 125, JUDGMENT AT LAW ON A STOP NOTICE CANNOT BE FOR A LESS AMOUNT THAN THAT MENTIONED IN THE NOTICE AS DEMANDED.

The owner is not bound by a judgment obtained by the claimant against the builder, see note 1, to § 4, post.

AMOUNT OF RECOVERY. It would seem that costs recovered by the claimant in a suit on his claim against the *builder,* could not be recovered in the suit against the owner. *Anderson v. Huff,* 4 Dick. 349.

ALLOWANCE TO OWNER, for the amounts due on stop notices cannot be made in the suit at law against him, unless he has paid them, *Wightman v. Brenner,* 11 C. E. Green 489; but, in such a case, the owner may have an injunction, to restrain the builder from enforcing a judgment recovered against him for the contract price. *Wightman v. Brenner,* supra.

INTERPLEADER SUIT. In a proper case, the owner who has been served with stop notices may file an interpleader, bringing, or offering to bring, the balance that is due on the contract into court.

For the practice in such case, see *Supt. v. Heath,* 2 McCart. 22;

Kirtland v. Moore, 13 Stew. 106; and *Hall v. Baldwin,* 18 Stew. 858. See also *Ter Knile v. Reddick,* 39 Atl. 1062, as to what such a bill should allege; *Schmidt v. Eitel,* 4 Rob. 8, that it must allege that there was a written building contract and that it was filed; *Turner v. Miller,* 61 Atl. 741, that such a bill should not be filed when there is no real doubt as to how the fund is to be applied; and *Kreutz v. Cramer,* 19 Dick. 648; *English v. Warren,* 20 Dick. 30, that the complainant cannot have costs if he alleges and tenders less than he is found, upon hearing, to actually owe.

This remedy has been sought in a number of other reported cases; and, as it takes some time to ascertain what these cases are, the list of them is hereto appended, omitting those already above cited:

Adams v. Wells, 19 Dick. 211;
Bayonne Assn. v. Williams, 43 Atl. 669; 14 Dick. 617;
Bayonne Assn. v. Williams, 42 Atl. 172; 12 Dick. 503;
Bd. of Education v. Duparquet, 5 Dick. 234;
Bowlby v. Willison, 11 N. J. L. J. 42;
Burnett v. Jersey City, 4 Stew. 341;
Beckhard v. Rudolph, 2 Rob. 315; Id. 740;
Chosen Freeholders v. Lindsley, 14 Stew. 189;
Donnelly v. Johnes, 44 Atl. 180;
Dunn v. Stokern, 16 Stew. 401;
Daly v. Somers Co., 4 Rob. 343; 1 Buch. 307;
Evans v. Lower, 1 Rob. 232;
Edge v. McClay, 64 Atl. 969;
Flaherty v. Atlantic Co., 44 Atl. 186;
Freedman v. Sandknop, 8 Dick. 243;
Fehling v. Goings, 1 Rob. 375;
Foster v. Rudderow, 3 Atl. 694;
Leary v. Lamont, 42 Atl. 97;
McNab, etc., Co. v. Paterson, etc., Co., 1 Buch. 133; 2 Id. 929;
Smith v. Dodge, etc., Co., 44 Atl. 639;
South End Co. v. Harden, 52 Atl. 1127;
St. Peters Church v. Van Note, 21 Dick. 78;
Turner v. Miller, 61 Atl. 741;
Veitch v. Clark, 1 Rob. 57;
Weaver v. Atlantic Co., 40 Atl. 858;
Williams v. Bradford, 21 Atl. 331.

Proceedings where contractor disputes the employe's or materialman's claim. Notice to claimant; suit to establish claim; limitation.

4. When a notice or notices shall be served upon such owner or owners by any journeyman, laborer or materialman, under the third section of this act, and notice thereof shall have been given by such owner or owners to the master workman or contractor, as required by said section, and said master workman or contractor shall, within five days

after receiving the notice aforesaid, notify in writing the journeyman, laborer or person who has furnished materials that he disputes his or their claim, and requests him or them to establish the same by judgment, the owner shall not pay the claim until it is so established;[1] (*and the journeyman, laborer or person who has furnished materials shall forfeit all right to the money which may be due or may grow due to the contractor from the owner, unless he shall begin suit to establish his claim against the contractor within sixty days from the service by the contractor upon said journeyman, laborer or person who has furnished materials of the notice aforesaid*)[2]; *provided,* the master workman or contractor shall notify the owner in writing that he has given the aforesaid notice to said journeyman, laborer or materialman.

1899, p. 348, § 1; *1898, p. 538,* § 4; *1895, p. 313,* § 3.

The amendment of 1899 inserts the words in parenthesis (—).

The act of 1895 was the first to make any provision on this subject, and this was re-enacted by the act of 1898 without change. The amendment of the previous section, by the act of 1905, p. 311, omitted, as is thereunder noted, to make the necessary corresponding changes in this section. It should, of course, be amended so as to make its provisions applicable to all who may be claimants under such preceding section.

1. Such judgment, by the claimant against the builder, when obtained, will not be res adjudicata, as against the owner. It may be given in evidence, in the claimant's action at law against the owner, upon his stop notice, to show, prima facie, the amount due; but it will not prevent the owner from pleading and proving, if he can, that the claim is in fact excessive. *Taylor v. Wahl,* 40 Vroom 471.

Costs recovered in this suit are not a lien on the fund. *Anderson v. Huff,* 4 Dick. 349.

2. The claimant, presumably, cannot escape the consequences of this clause, by serving a new stop notice after he is notified to bring his suit. *Sewall v. Hawkins,* 17 Vroom 161.

Owner's liability in case he makes advance payments. Inchoate lien, of employes and materialmen, on the contract price.

5. If the owner or owners of any building or other property which, by this act, is made the subject of liens for or toward the construction, altering, repair or improvement of

which labor or services have been performed or materials furnished by contract, duly filed, shall, for the purpose of avoiding the provisions of this act, or in advance of the terms of such contract, pay any money or other valuable thing on such contract, and the amount still due to the contractor, after such payment has been made, shall be insufficient to satisfy the notices served in conformity with the provisions of this act, such owner or owners shall be liable in the same manner as if no such payment had been made.

1898, p. 538, § 5; 1895, p. 313, § 5.

The act of 1898 re-enacts without change the act of 1895, which was the first provision of this nature. This section and the next succeeding one are considered together in the notes under the latter.

Wages made a preferred claim, whether on lien or under stop notice. Preferences of stop notices over orders.

6. In all cases journeymen or laborers shall have priority and preference over any employers of labor, contractors or materialmen for the payment of wages, without reference to the date when said journeymen or laborers shall have filed the lien or served the notices provided for in this act; (*laborers or materialmen giving notices in accordance with the provisions of the third section shall have priority and preference in the disposition of the moneys due and to grow due upon the contract over any persons claiming said moneys or any part thereof by reason of order or orders thereon or assignment thereof*).

1898, p. 538, § 6; 1895, p. 313, § 7.

The words in parenthesis (—) were inserted by the revision of 1898, otherwise the section is the same as it stood in the act of 1895, which was the first provision of this nature.

THE LAW, PRIOR TO THE ENACTMENT OF THE FOREGOING SECTIONS, on the question of the respective priorities of various claimants to the fund in the owner's hands, may be briefly reviewed as follows:

As already stated, under section 3, note 3, it was settled that a stop notice operated as well on moneys to grow due as on moneys that had become due at the time of its service. But although this was settled, and although, as said, in *Wightman v. Brenner*, 11 C. E. Gr. 489, the claimant under a stop notice had a right of recourse against the fund, as well as a right of

action against the owner; it was held that he had no *lien* on the fund, prior to the service of his notice, and that, therefore, the contractor was at liberty, by order or assignment, to dispose of the moneys, secured to him by the contract; and that, to the extent that he did this, before any stop notice was served, the fund, upon which such notice could operate, was lawfully depleted, in respect of what was to grow due as well as of what had become due to him, on the contract. *Craig v. Smith,* 8 Vroom 549; *Shannon v. Hoboken,* 10 Stew. 123; *Kirtland v. Moore,* 13 Stew. 106; *Burnett v. Jersey City,* 4 Stew. 341; *Chosen Freeholders v. Lindsley,* 14 Stew. 189; *Lanigan v. Bradley Co.,* 5 Dick. 201; *Board of Education v. Duparquet,* 5 Dick. 234; *Mayer v. Mutchler,* 21 Vroom 162; *Hall v. Baldwin,* 18 Stew. 858; *Supt. v. Heath,* 2 McCart. 22.

But, as the fund was subject to the disposal of the contractor, so it was also subject to the attack of his creditors, with this difference—that their attack, by supplementary proceedings (and the same is probably true of an attack by attachment) could only reach moneys which had become due to the contractor at the time of such attack. *Willison v. Salmon,* 18 Stew. 257. As we have already noticed (§ 2, note 2), a general creditor of the contractor, holding an order, was held to stand the same as an assignee who had furnished him with labor and materials; and, from the time of the decision of *Superintendent v. Heath,* 2 McCart. 22, it was held, that holders of orders, and claimants under stop notice, must each be paid out of the fund, so far as it was subject to their claims, in the order of their priorities and not pro rata.

THE LAW UNDER THE ENACTMENT OF 1895.

The first case to arise, after the enactment of §5, was, *Binns v. Slingerland,* 10 Dick. 55; s. c., overruled on appeal, 11 Dick. 413. In this case, the Court of Errors held, that, by prohibiting the owner from making any payment in advance of the terms of the contract, the legislature evinced an intention to give, to laborers and materialmen, an inchoate lien upon the contract liability of the owner, until that liability matures, according to the terms of the contract; that such inchoate lien becomes perfected, on the service of a stop notice before such liability matures, but expires, on such maturity, if no such notice is given; and that, therefore, workmen and materialmen who serve stop notices in season, have priority over persons to whom the contractor may have assigned, before their notices were served.

Shortly after this decision, the case of *Leary v. Lamont,* 42 Atl. R. 97, came before Vice Chancellor Emery, and the case of *Bayonne, etc., Assn. v. Williams,* 42 Atl. R. 172, before Vice Chancellor Pitney. Both Vice Chancellors held that, inasmuch as the statute, as constructed in *Slingerland v. Binns,* gave to claimants under stop notices, an inchoate lien, in advance of their notices, their priorities, inter se, could not be determined, with regard to the dates on which such notices were served; and that, therefore, they must share pro rata in the fund. This ruling was reversed by the Court of Errors, in *Bayonne, etc., Assn. v. Williams,*

43 Atl. R. 669, and it was established, that such claimants, as between themselves, must be paid according to the priority, in service, of their notices, and not pro rata.

It had also been held, by Vice Chancellor Pitney, that an order given by the contractor to a laborer or materialman, and presented to the owner was as effectual, in equity, as a stop notice could be, in perfecting the inchoate lien of such claimant; but this too was overruled by the Court of Errors which held that, on the contrary, the inchoate lien can only be perfected by the statutory method of demand, refusal, and service of notice.

In the meanwhile, V. C. Grey had decided, in *Weaver v. Atlantic, etc., Co.,* 40 Atl. R. 858, that the inchoate lien, given by § 5, arose only in cases where a contract had been *duly* filed.

The next case, *Donnelly v. Johnes,* 44 Atl. R. 180, also came before V. C. Grey, for decision, and, after a careful review of the decisions of the Court of Errors above referred to, he held, that as each installment of the contract price becomes due, it is liable, first, to claimants who, prior to that time, have served stop notices. If it more than meets these notices, the residue is at the disposal of the contractor, and liable to the attack of his creditors; if it is insufficient to satisfy the stop notices, they will operate, so far as unsatisfied, on the next installment, and so on; but no stop notice can operate, as a preference, on any part of the owner's liability which has matured before such notice is served; because the inchoate lien, quoad such matured liability, is lost unless such notice is served on or before the day of such maturity.

In all the cases above cited, the ruling in *Binns v. Slingerland,* was the basis of decision; and the statement, that the inchoate lien, given by virtue of the act of 1895, exists until the maturity of the owner's liability, but expires on such maturity, if not perfected by notice before then given, a statement which was plainly *obiter* in the *Binns* case, was more or less explicitly adopted in each of them, as in the *Donnelly* case, as a precisely correct statement. The same may be said of the succeeding decisions in *Flaherty v. Atlantic, etc., Co.,* 44 Atl. 186; *Smith v. Dodge, etc., Co.,* 44 Atl. 639; *Person v. Herring,* 44 Atl. 753, the last named being a decision of the Court of Errors and Appeals. That such was, therefore, the correct exposition of the law, as it then stood, may be taken as settled, beyond any question, by those decisions; all of which, however, were in cases arising before the revision of 1898.

THE LAW SINCE THE REVISION OF 1898. By this revision of 1898 the concluding clause of § 6, as it now stands, was, for the first time, added, and that modification of the statute might be deemed to have a material effect in modification of the conclusion reached in *Binns v. Slingerland,* and the cases above cited, in respect of the duration of the inchoate lien of claimants entitled to give a stop notice. The decisions in cases arising since the revision of 1898, so far as concerns the point in question, do not, however, give that clause any consideration. They do not even refer to it, or mention it, and their rea-

soning plainly is based upon the theory that the fifth section of the statute is the only provision in it which confers any such inchoate lien. They, therefore, adopt the dictum of the *Binns* case, as the correct statement of such lien's duration, as plainly they should do, if that theory is true.

The cases referred to are *Blauvelt v. Fuller,* 48 Atl. 538; and *Taylor v. Reed,* 52 Atl. 579, both decided in the Supreme Court; and *Edge v. McClay,* 64 Atl. 969, decided in the Court of Chancery. *Blauvelt v. Fuller* is not really in point, in any way, upon the matter in question. There the owner's liability matured on August 28, 1899, and he then paid the builder all that was due him except the sum of $530, having been previously served with a materialman's stop notice for $500. Blauvelt's stop notice for $927.84 was served September 1, 1899. Upon any possible theory, as to the duration of the inchoate lien, the fund in the owner's hands, at the time his stop notice was served, was only $530, and $500 of this was subject to the prior right of the previous stop notice. It was, therefore, held that his notice reached only the $30. The opinion does not refer, and should not have referred either to the *Binns* case or to §§ 5 or 6.

In *Taylor v. Reed,* the filed contract provided for a final payment or $1,500. The owner paid the builder $1,000 of this in advance of its due date. After the due date the plaintiff gave his notice, but it was held that the $1,000 payment was good against him. This case is in point.

In *Edge v. McClay,* the owner's right to discharge his debt to the builder matured on January 2, 1906. Claimant Horner gave his notice on January 3, 1906. It was held that other defendants claiming by assignments given by the builder before January 2, 1906, took the fund, to the exclusion of Horner. This case is also in point.

The case of *Kreutz v. Cramer,* 19 Dick. 648, should here be mentioned. In that case an installment of $960 matured on May 25, 1902. On May 27, 1902, Cramer served his notice, while such matured installment was still unpaid by the owner, and unassigned by the builder. Upon the contention that Cramer's notice did not reach this installment, because, as ruled in the *Binns* case, his inchoate lien had expired on May 25, 1902, it was held that the expiration of the inchoate lien left the money still liable to be impounded by a notice put in before it has in fact been paid to, or assigned by, the builder; and that the fact that there are still other moneys yet to grow due, which may suffice to meet the notice put in, does not enable the owner to disregard such notice.

In *Taylor v. Reed* and *Edge v. McClay,* as is above stated, it is apparently assumed that no inchoate lien is given by the statute, unless by its fifth section. Is that assumption correct? The concluding clause of § 6 says—that "laborers or materialmen giving notices, etc., shall have priority and preference in the disposition of the moneys DUE and to grow due upon the contract over any persons claiming said moneys or any part thereof by reason of order or orders thereon or assignment there-

of." Now it would seem quite plain that, if § 5 evinces a legislative intent to give laborers and materialmen an inchoate lien, by its prohibition of advance payments; this clause of § 6 evinces a similar intent just as obviously by giving such claimants the priority and preference which it does. It is suggested, therefore, that that is a question which should receive deliberate consideration, and that if an inchoate lien is given by this clause, the duration of such lien must also be a question to be determined by a careful consideration of its terms, in the light of their obvious legislative purpose. Upon that matter the following suggestions are appended:

Prior to the revision of 1898, it was plain that the inchoate lien recognized in the *Binns* case could only have been posited upon the inference there drawn from the prohibition of advance payments contained in § 5. It was, therefore, as the law then stood, a proper, if not a necessary inference also, that the duration of such inchoate lien must be co-extensive with the period within which such prohibition operated, and must cease when it ceased, that is, with the maturity of the owner's liability. But now, if § 6 also gives laborers and materialmen an inchoate lien, by giving them "priority and preference in the disposition of the moneys *due and to grow due, etc.*," over persons claiming by order or assignment; the duration of such inchoate lien must be determined by those terms, and the purpose which the legislature had in view. It would seem, then, to follow that such inchoate lien continues, as against assignees or holders of orders, and, therefore, as against the builder's own demand for payment, beyond the mere arrival of the time when the owner may rightfully discharge his liability to the builder, and until he has actually exercised that right. That is to say, the maturing of the contract may be deemed to confer upon the owner the right to pay the builder without enabling the latter to demand that he do so, until he can show that there are no laborers or materialmen who may make claim.

In this view, the inchoate lien of such claimants would be liable to be defeated by the owner's exercise of his right to pay before a stop notice came in, but until *so* defeated it would continue to exist, as against the builder or his assignees.

The assertion of such a purpose is not an assertion of something which it is impossible or improbable that the legislature could intend. On the contrary, the legislature has heretofore (by the acts of 1890, p. 479, and 1892, p. 358, both repealed in 1895) tried the expermient of protecting claimants by the similar expedient of forbidding an owner to discharge his liability unless *he* first saw that all possible claimants were satisfied.

In the theory above advanced, the right of the owner to discharge his liability, by payment after its maturity to the builder or his assignee, before any stop notice intervened, would be based upon the fact that the statute only forbids *him* to make any *advance* payment. On the other hand, the denial of any right, on the part of the builder, to demand the payment of the money earned, so long as there were any unsatisfied laborers or material-

men, would be rested on the express words of the statute, and the reasonable inference therefrom, that the statute intends that he himself may not demand what it forbids him to give another the right to demand.

From this theory it would result that any orders or assignments given by the builder at any time, but not in fact paid by the owner after his right to discharge his liability has accrued, and before a stop notice intervenes, would be defeated by such a notice coming in.

It would also be in harmony with this theory, to hold, that the owner's right to discharge his liability by payment made after such right has accrued, could not relieve him from the consequences of an advance payment which § 5 denounces; and that he would be precluded from pleading or proving in defense, as against any laborer or materialman, any payment that he had made so in advance. In short, that any such payment, in its legal effect in respect of his liability to a claimant, shall be just what the statute says—"the same as if no such payment had been made;" just as a Sunday bargain is the same as though it had never happened.

It is hardly necessary to say that the views thus suggested are not presented as exhausting, by any means, all that may be urged, pro or contra, in the matter; but it is thought that there is a real question for the courts to consider in the premises. The cardinal thing that should be borne in mind, as it seems to the writer, is, that when the legislature says that laborers and materialmen shall have priority and preference as to *the moneys due,* it means that they shall have all that is necessary, in order to secure to them such priority and preference.

Attention is also directed to the case of *Adams v. Wells,* 19 Dick. 211. In this case the final payment matured on April 7, 1902. Defendant Beatty had an assignment dated January 20, 1902, of which the owner had notice on April 8, 1902. After that other defendant claimants served stop notices; and, on interpleader, contended that they were entitled to preference over Beatty, as being within the provision of the last clause of § 6. Without determining whether that contention would have been good if the claimants had been within the class of persons there mentioned, and without intimating that it would not have been, the decision was that the claimants were not within such class, because they were sub-contractors.

In this case, as in *Donnelly v. Johnes,* 44 Atl. 180, it was held that persons claiming preference, under § 6, must show that they are within the specified class, and that it is not to be assumed, without proof, that they are.

It may be that, in *Taylor v. Reed* and *Edge v. McClay,* the claimants might have been precluded on similar grounds.

APPORTIONING THE FUND. There must, of course, be a fund to to be apportioned. That is, the claimants can have recourse to that only which the contractor, but for them, would be entitled to receive from the owner. If there is such a fund, its apportionment must be determined by the order in which the

various claimants have established a legal lien upon it. Now there is nothing in the statute which gives any other claimant a preference over a creditor of the contractor, who has established a lien by process of law; and it is a possibility, that an attaching creditor might attach the fund, the day after the contract had been completed and the price had become due, and before any stop notice had been served, or after some such notices and before others. In such a case, we think that the attaching creditor would be entitled, on any theory as to the effect of § 6, to have his claim satisfied according to the respective priority of the notices and of his attachment. Eliminating all such liens from our present consideration, the application of the fund may differ, according as the effect of § 6 is held the one way or the other. And,

First,

On the assumption that the preferences, given by § 6, affect, as well moneys due before notices are served, as moneys to grow due thereafter; the *whole fund* must then be appropriated as follows, viz.:

1. To the claims of wage workers, in the order of service of their notices;
2. The residue then left, to all other claimants by stop notice, in the order of service of their notices;
3. The residue then left, to the holders of orders or assignments given by the contractor; and
4. The residue then left, to the contractor.

Second,

On the assumption that the preferences, given by § 6, affect only the moneys to grow due when notice is served, *so much of the fund only as became due on or after* the service of a notice or notices, must be applied, as above indicated, to that notice, or those notices, according to their preferences and priority of service; and the residue of the whole fund must be appropriated:

1. To the holders of orders, or assignments, and to unsatisfied claimants under stop notices, in the order of time of each one's order, assignment, or notice; and
2. The residue, if any, to the contractor.

AN ORDER OBTAINED BY A FRAUD practised upon the builder by the holder may be attacked by claimants under stop notice. *English v. Warren,* 20 Dick. 30.

ALTERATION OF CONTRACT TERMS. As the inchoate lien of the laborers or materialmen precludes the contractor from making an effective disposition, as against them, of the moneys secured to him by the contract, by direct order of assignment; so it must necessarily limit his power to affect their interests detrimentally in any indirect way. Accordingly, in *Smith v. Dodge & Bliss Co.,* 44 Atl. R. 639, the Court of Errors held, that, the terms of the contract could not be altered, by an agreement between the contractor and the owner made after it was filed, so as to impair or defeat the claims of materialmen or laborers, as

by reducing the contract price; unless the contract as filed authorized and provided for such an alteration.

So in *South End Imp. Co. v. Harden,* 52 Atl. 1127, it was held that when the contract provides that the parties might *agree* to alterations; and they did agree thereafter upon such, such agreement was a new contract and the work thereunder not in pursuance of the original contract. See notes to form of building agreement post.

In *Daly v. Somers Co.,* 4 Robinson, 343; s. c. aff. 1 Buch. 307, it was held that the owner cannot safely waive the production of the architect's certificate; as he may become liable to claimants, if he pays without first obtaining it, when it is not unreasonably or fraudulently withheld by the architect.

In *Veitch v. Clark,* 1 Rob. 57, it is held that the owner may safely pay upon the architect's certificate, although in some slight particulars there is work still undone; when the owner and architest both act in good faith, and the undone work is such as it is customary to leave undone, to aid the progress of the work.

Land not liable to lien unless building be erected with owner's consent in writing, acknowledged and recorded.

7. If any building be erected by a tenant or other person than the owner of the land,[1] then only the building and the estate of such tenant or other person so erecting such building,[2] shall be subject to the lien created by this act and the other provisions thereof, unless such building be erected by the consent of the owner of such lands in writing,[3] which writing may be acknowledged or proved and recorded,[4] as deeds are, and when so acknowledged or proved and recorded, the record thereof and copies of the same, duly certified, shall be evidence in like manner.

1898, p. 538, § 7; 1853, p. 437, § 4; Rev. 1874, § 4.

This section has remained unchanged in the above form since its enactment as § 4 of the act of 1853.

1. A building is not erected by the owner of the land when he allows his son to contract, in the latter's name, for its erection, and to superintend its construction, upon the former's land; even although the father also furnishes the money for the work. *Babbit v. Condon,* 3 Dutch. 154; but a building is erected by the owner when he orally employs another to build it, *American Brick Co. v. Drinkhouse,* 30 Vroom 462; or where he contracts in his own name, in writing, for its erection, *Young v. Wilson,* 15 Vroom 161; *Erdman v. Moore,* 29 Vroom 445; though such contract be not filed, *Brewing Company v. Donnelly,* 30 Vroom 48; or where the contract is made by the owner's agent in the latter's name only,

Earle v. Willetts, 27 Vroom 334, and see § 2 supra, note 1, owner's signature to contract.

2. THE TENANT'S SURRENDER of his term, and abandonment of the building, erected on the land, to the landlord, cannot defeat the lien of one who has given work or materials to the construction of the building. *Hagan v. Gaskill,* 15 Stew. 215. The building in this case was a pier, and the lessee's estate was a ten year term in the shore front.

If a claimant seeks to enforce a lien against the estate of the tenant, he must, in his lien claim and suit, describe him, and not the lessor, as the owner. *Corcoran v. Jones,* 12 N. J. L. J. 38.

A LICENSEE (the license being revocable) has no interest or estate in the land which can be subjected to a mechanic's lien. *Wm. H. Atkinson Co. v. Shields Co.,* 72 Atl. 81. See post, under § 24, Form of Judgment.

A litigation under this clause may require the separate valuation of the land and fitxures thereon. *Central R. R. C. v. State Board,* 67 Atl. 672, at p. 685.

3. THE CONSENT REQUIRED by the statute must be such as clearly shows that the owner intended to subject his lands to a possible lien for the contemplated work, *Associates v. Davison,* 5 Dutch. 415; *Hervey v. Gay,* 13 Vroom 168, reversing s. c., 12 Vroom 39; and approving s. c., 1 N. J. L. J. 51; *Mackintosh v. Thurston,* 10 C. E. Gr. 242; and so a lease which authorizes the tenant to make repairs or alterations at his own expense, or a similar permission in writing, not incorporated in the lease, is not the statutory consent. *Hervey v. Gay,* supra; *Dey. v. Davis,* 18 N. J. L. J. 301.

It was held by Vice Chancellor Bird, in *Leonard v. Cook,* 20 Atl. 855, that the lien claims of mechanics and others for erecting a building for a vendee in possession before any deed was delivered, but with the vendor's knowledge, is superior to the claim of the vendor, who afterwards delivered the deed, for the unpaid price of the land.

A CONTRACT TO CONVEY lands does not amount to the statutory consent, to the erection of buildings for the vendee, *National Bank, etc., v. Sprague,* 5 C. E. Gr. 13; *Gibbs v. Grant,* 2 Stew. 420; even although the vendor agrees to loan the vendee the money therefor, *Associates, etc., v. Davison,* supra; *Mackintosh v. Thurston,* supra; nor does the vendor's statement, to the persons who are erecting the building for the vendee—that they will be perfectly safe in going on with the work—amount to such consent. *Strong v. Van Deursen,* 8 C. E. Gr. 369.

A LEASE AND CONTRACT to convey are not the necessary consent. *Currier v. Cummings,* 13 Stew. 145.

A FICTITIOUS CONTRACT, which, on that account, by being filed, does not protect the land from lien, is good as a consent on the part of the owner who signed it. *Young v. Wilson,* supra.

PERSONS NON COMPOS. The land of a person, in law (or

in fact?), incapable of giving a consent cannot be liable to a lien for a building erected upon it; as, for example, in the case of a minor, *Hall v. Acken,* 18 Vroom 340. As to married women see, *Washburn v. Burns,* 5 Vroom 18; and post, section 13.

4. The consent does not have to be acknowledged or recorded; the statute does not mean, must or shall be acknowledged, etc. *Gay v. Smith,* 1 N. J. L. J. 51; s. c. approved, 12 Vroom 39. See also, *Young v. Wilson,* supra; *Erdman v. Moore,* 29 Vroom 445.

The word, building, defined (to include, an addition to a former building, any fixed machinery or gearing, or fixtures for manufacturing purposes). Fixtures for manufacturing purposes, defined.

8. Any addition[1] erected to a former building, and any fixed machinery or gearing, or other fixtures for manufacturing purposes,[2] shall be considered a building for the purposes of this act. The words, "fixtures for manufacturing purposes," as used in this section, shall be construed to include any building erection, or construction of whatever description, attached or annexed, or intended to be attached or annexed, to any land or tenement, and designed to be used in the building or repairing of vessels, whether the same be permanently attached to the freehold, or so built as to be removed from place to place, and only temporarily attached to the land and whether the same be intended and designed for use on land or water.[3]

1898, p. 538, § 8; 1853, p. 437, § 5; 1860, p. 689; Rev. 1874, §§ 5, 6.

The act of 1853, § 5, read—

"Any addition erected to a former building, and any fixed machinery, or gearing, or other fixtures for manufacturing purposes shall be considered a building for the purposes of this act; but no building shall be subject to the provisions of this act, for any debt contracted for (*repairs done thereto or*) alterations made therein." The Revision of 1874, § 5, omitted the words which we have enclosed in parenthesis, but left the section otherwise unchanged.

The Revision of 1898, it will be noticed, omits the entire concluding clause, and then joins into the same section the definition of the words, fixtures for manufacturing purposes, which was first enacted in the act of 1860, p. 689, and stood as § 6 in the Revision of 1874.

1. AN ADDITION TO A BUILDING, means a lateral addition, one which occupies land without the limits of the original

building; but adding to its height, or depth, or changing its interior structure, is an alteration, not an addition. *Perrine v. Parker,* 5 Vroom 352; *Updike v. Skillman,* 3 Dutch. 131; and so, a piazza is an addition, *Whitenack v. Noe,* 3 Stock. 321, 413; but a bay window is not (?), nor a new roof, *Perrine v. Parker,* supra; nor another story, *Updike v. Skillman,* supra.

2. A BRICK MAKING MACHINE, when permanently added to the freehold, is a fixture for manufacturing purposes, *American Brick Co. v. Drinkhouse,* 30 Vroom 462; so is a WOODEN FLUME, to lead water from the dam to the mill wheel inside the mill, *Edwards v. Derrickson,* 4 Dutch. 39; s. c., 5 Dutch, 468; so are the POLES, WIRES, INSULATORS, etc., of an electric power company, erected for transferring power. *Hughes v. Lambertville, etc., Co.,* 8 Dick. 435.

MANUFACTURING PURPOSES. The production of electricity for use on a trolley road is a manufacturing purpose, within this clause: and ENGINES, DYNAMOS, and other connected appliances for the production and control of electric power, set up in a power house for such use are fixtures under this section, if they are not indeed part of the realty anyway. *Bates Co. v. Trenton Co.,* 41 Vroom 684.

ENGINES, PUMPS, BLOWERS, STEAM BOILERS, GEARING, BELTING, EMERY WHEELS, MELTING FURNACES, GRINDING MILL, and SMOKE STACKS, placed for use in the building of a steel casting company, are fixtures. *Currier v. Cummings,* 13 Stew. 145.

A BORING MILL, A BORING AND TURNING MILL, AN ENGINE LATHE, A FEED DRILL, A KEY SETTER, AND A COUNTER SHAFT, delivered to a water wheel manufacturing company, to be placed in its factory, are fixtures for manufacturing purposes, as soon as so delivered. *Campbell v. Taylor, etc., Co.,* 51 Atl. R. 723, reversing s. c., 49 Atl. R. 1119.

COPPER ROLLS, for print cloth machines, are not fixtures for manufacturing purposes. *Griggs v. Stone,* 22 Vroom 549.

MOVABLE MACHINES, not indispensable to the enjoyment of the freehold, nor intended to be permanently annexed to, and made part of the realty, are not fixtures. *Rogers v. Brokaw,* infra; *Case v. Arnett,* 11 C. E. Gr. 459; s. c., 2 Stew. 309.

THE TRUE CRITERION OF A FIXTURE is, the united application of the following requisites: 1. Actual annexation to the realty, or something appurtenant thereto. 2. Adaptation to the use to which that part of the realty, to which it is connected, is appropriated. 3. The intention, of the party making the annexation, to make thereby a permanent accession to the freehold. Of these three tests pre-eminence is given to the question of intention. *Erdman v. Moore,* 29 Vroom 445; *Brearley v. Cox,* 4 Zab. 289; *Quinby v. Manhattan, etc., Co.,* 9 C. E. Gr. 261; *Rogers v. Brokaw,* 10 C. E. Gr. 496. But under this section, the determination is one of statutory construction rather than of the law of fixtures and the test is whether the tools were not mere movable tools, but were intended to be used as a permanent part

if the plant. *Campbell v. Taylor Co.*, 19 Dick. 344; rev. s. c., 17 Dick. 307.

DOUBTFUL CASES. Whenever machinery is of such a character as to be susceptible of the common law lien (manual transmission), doubts, as to whether it is also subject to statutory lien, should be resolved in the negative. *Griggs v. Stone*, 22 Vroom 549.

3. Until this enactment, a floating dock could not be considered to be a fixture for manufacturing purposes. *Coddington v. Beebe*, 2 Vroom 477.

Mills and factories and their curtilages liable to lien for repairs to fixed machinery, etc.

9. The lien given by this act is hereby extended to all mills and manufactories, of whatever description, within this state, and to the lots of land or curtilages whereon the same are erected, for all debts contracted by the owner or owners thereof, or by any other person with the consent of such owner or owners, in writing, for work done or materials furnished for or about the repairing of any fixed machinery, or gearing, or other fixtures for manufacturing purposes, on the same.

1898, p. 538, § 9; 1855, p. 211; Rev. 1874, § 7.

This section remains unchanged as first enacted in 1855 and taken into the Revision of 1874 as § 7.

AS TO FIXED MACHINERY, etc., see supra, § 8, and notes

PRIORITY OF BONA FIDE PURCHASERS AND MORTGAGEES. Quaere. Do the provisos in § 10 apply also to claims under this section. By the definition of § 8, it would seem that all the claims provided for in this section (9) are also provided for in § 10. See *American Brick Co. v. Drinkhouse*, 30 Vroom 462, in which it was expressly held, that the alteration of fixed machinery was the alteration of a building, within the meaning of the act of 1883, p. 24; and see also, note to § 10 below.

Building and curtilage liable to lien for repairs or alterations. Prior encumbrancers and purchasers.

10. The lien given by this act shall be and is hereby extended to all buildings of whatever description (*erected or to be erected*) in this state and the lots or curtilages whereon the same are erected, for all debts contracted by the owners thereof, or by any other person with the consent of the owner or owners in writing,[1] for work done or materials fur-

nished in and for the repairing (*or alteration*) of any such building;[2] **provided, however,* that said lien shall not be valid against a bona fide purchaser or mortgagee before said lien is filed in the office of the clerk of the county (*in which said lot or curtilage is situate;*[3] *and provided further, that work done or materials furnished under contract in and for such repairs or alterations shall be liable to the said contractor alone in the manner provided by the second section of this act*).

1898, p. 538, § 10; 1859, p. 451; Rev. 1874, § 8; 1883, p. 24.

The act of 1859, p. 451, was substantially the same as the above section, omitting the words in parentheses. It also had, at the place indicated by the asterisk, the words—"provided the agreement be made a matter of record in the office of the clerk of the county." The Revision of 1874. in § 8, embodied this act of 1859, substantially word for word, except that it omitted the proviso just above quoted.

The act of 1883, p. 24, enacted, "that the lien given by the act to which this is a supplement, shall be and is hereby extended to all buildings, of whatever description, within this State, and to the lot or curtilage whereon the same are erected, for all debts contracted or owing to any person for work done or materials furnished in and for the alteration of any such building; *provided,* that work done or materials furnished under contract in and for such alterations shall be liable to the contractor alone, in the manner provided by the second section of said act."

It will be noticed that this act gave the lien although the owner of the land had not contracted the debt and had not consented in writing that the work be done. *American Brick Co. v. Drinkhouse*, 30 Vroom 462. The present act repealed the act of 1883, and, in the above section, requires that the debt must be the debt of the owner or else that the work be with his written consent. *Murphy v. Hussa*, 40 Vroom 381.

In both the act of 1883 and the present section. it will be noted, that the proviso does not say what it means, viz.; that *for* work done or materials furnished under contract (in and) for such repairs or alterations, *such building and the land whereon it stands* shall be liable, etc.

1. A lease which provides that the tenant may make repairs, at his own expense, is not a sufficient consent. *Hervey v. Gay*, 13 Vroom 168. See, generally, § 7, notes 1, 3 and 4.

2. THE ALTERATION of an old building is not the erection and construction of a building, even although the alteration very materially changes the building in dimensions, general appearance, and structure, so that, in a fair sense, it might be said to be

a new structure. *Combs v. Lippincott,* 6 Vroom 481; *Updike v. Skillman,* 3 Dutch. 131.

A CESSPOOL, connected with the bath room, is part of an alteration of the bath room. *Burd v. Huff,* 17 N. J. L. J. 80.

Where the evidence clearly shows the character of the change in a building, it is for the court, not the jury, to say, whether it *is* an alteration or an addition, *Updike v. Skillman,* 3 Dutch. 131.

That the ALTERATION OF FIXED MACHINERY is the alteration of a building see, *American Brick Co. v. Drinkhouse,* 30 Vroom 462.

3. PRIORITY OF BONA FIDE PURCHASERS AND MORTGAGEES. Originally, by the provisions of § 11 of the act of 1853, lien claimants were given priority over encumbrances which did not exist at the time the building was begun.

In extending the lien to the case of repairs of fixed machinery, etc., by the act of 1855 (see now § 9 supra), the legislature made no change in this previously established order of priority; but when, by the act of 1859 (now incorporated in the present section), it extended the lien to the case of repairs of all buildings; it took care, by its proviso, to subject the rights of such claimants to the rights, of bona fide purchasers or mortgagees, intervening before a lien claim was filed, and so differentiated such claims from all others.

In all subsequent legislation, to th time of the present revision, this limitation remained applicable only to claims for repairs, as will be seen by reference to § 11 (act of 1871, p. 66), § 12 (act of 1893, p. 385, §§ 1 and 2), §§ 8 and 9, and the text of the act of 1883, p. 24, above quoted; except so far as the provisions of the act of 1895, p. 313, § 6 (§ 15, post) may have affected them. But now, by eliminating the act of 1883, p. 24, and inserting the word, "alterations," in this section, the legislature has also subjected claims for alterations to this same disability.

The statute does not make it clear that the deed, or mortgage, of the bona fide purchaser, or mortgagee, must be recorded before the lien claim is filed, in order that the lien, for alteration or reparation, shall be invalid as against them; and it would seem to be clear, that the right of a bona fide purchaser, at a sheriff's sale on a judgment antedating the commencement of the improvement, but whose deed, by no laches, was not recorded until after a lien was filed, would be determined by the date of the judgment and not of the record of the deed. But, presumably, there must be a record of the deed, or of that from which the deed derives its efficacy, prior to the filing of the lien claim, in order to postpone the latter to the former.

PRIORITY AS TO OTHER ENCUMBRANCERS. It will have been noticed, that the present section says nothing, as to the relative priority of a lien claim for alteration or reparation, and the encumbrances of others than bona fide purchasers and mortgagees; and the provisions of the act of 1895, p. 313, § 6, (§ 15 post), above adverted to, also qualify the effect of this section, in respect of a certain class of mortgagees. An analysis

of all these different provisions, in respect of the question of priorities, is hereafter attempted, and reference is here made thereto. (See § 28 post, note 2.)

As to WHO IS A BONA FIDE MORTGAGEE, it has been decided that he is such who has taken his mortgage before he has actual notice that the work of reparation or alteration has begun, *Burd v. Huff,* 17 N. J. L. J. 80; *Reed v. Rochford,* 50 Atl. R. 70; and that a mortgage is bona fide, even if given to secure a debt which had arisen previous to the execution of the mortgage, because the statute does not say that the mortgage must be for value, as well as bona fide. *Reed v. Rochford,* supra.

Docks, etc., and lands fronting same liable to lien for the construction of same.

11. The lien given by this act is hereby extended to all docks, wharves and piers erected upon any navigable river in this state, and to the lots of land in front of which such docks, wharves or piers may be erected, and all the interest of the owner or owners of such land in the soil or waters of such navigable river in front of said lands, for all debts contracted by the owner or owners thereof, or by any other person with the consent of such owner or owners, in writing, for work done or materials furnished for or about the erection or filling-in of said docks, wharves or piers.[1]

1898, p. 538, § 11; 1871, p. 66; Rev. 1874, § 10.

This section is substantially the same as when it was first enacted in 1871, and afterwards embodied in the Revision of 1874 as § 10.

1. See above, under § 7, note 2, *Hagan v. Gaskill,* 15 Stew. 215.

Building and curtilage liable to lien for the removal of same. Removal of building defined (to include the erection, construction and repair of foundation or superstructure to which the removal is made).

12. Every building or part or parts of any building which shall hereafter be removed and shall be located upon some other lot or curtilage, and which shall, when removed, constitute a complete structure or a part of a structure upon the curtilage to which the same shall be removed, shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished in the removal of the same, which debt shall be a lien on such

building so removed and the building to which the same shall be attached or incorporated and on the land whereon the building shall be removed, including the lot or curtilage whereon the same is located by such removal; all of the labor performed and materials furnished in erecting, constructing and repairing the foundation or superstructure, upon which such removed building shall be located upon or incorporated with some other building, shall be deemed and taken to be labor performed and materials furnished in the removal of the biulding.

1898, p. 538, § 12; 1893, p. 385, §§ 1-2.

This section embodies, without change, §§ 1 and 2 of the act of 1893, which was the first provision on the subject.

Land of married woman liable to lien for building erected thereon with her knowledge, unless she files a written notice to the contrary.

13. Any married woman, upon whose lands any building or buildings shall hereafter be erected or repaired, or whereon any fixtures shall be put, shall be taken as consenting to the same, and such building or buildings and curtilages whereon the same are erected shall be subject to the lien created by this act; *provided always,* that in case said married woman shall cause to be filed in the clerk's office of the county wherein such building or buildings are located a notice in writing, describing the property, and that she does not consent to the erection or repairng of such building or buildings on her lands, and that the same is being done against her wishes and consent, then, in such case, the building or buildings, and the curtilages whereon the same are erected, of any married woman, shall be free from the lien given by this act from the time she shall have filed a notice as aforesaid; (*and provided further, that nothing in this act contained shall be so construed as to make the lands of any person liable for any building or repairs not authorized by the owner, or built or done without the knowledge of the owner*).

1898, p. 538, § 13; 1870, p. 65; Rev. 1874, § 9, § 28; 1876, p. 66. See also *1866, p. 1015, § 1.*

The words in parenthesis were added by the act of 1876; in all other respects the section reads the same as when first enacted in 1870, and as subsequently embodied in § 9 of the Revision of 1874.

THE QUESTION OF THE CONSTITUTIONALITY of this section does not seem to have been raised in any case in this State as yet; it has, however, been decided in other jurisdictions that such a provision, inasmuch as it requires knowledge or consent on the part of the owner, does not deprive such owner of his property without due process of law. *Wheaton v. Berg,* 50 Minn. 525; *Congdon v. Cook,* 55 Min. 1; *Title Co. v. Wrenn,* 35 Oreg. 62; 76 Am. St. Rep. 454.

But a statute which imposes a lien, for a building erected on a person's lands, without requiring any proof that it was so built with either his consent or knowledge, and merely upon such owner's failure to disavow any responsibility therefor, is a violation of the constitutional provisions referred to; even although the statute purport merely to provide a rule of evidence by which such owner's consent might be taken as inferrible from the fact that the building was erected on his land, without objection on his part. *Randolph v. Builders, etc., Co.,* 106 Ala. 501;; *Meyer v. Berlandi,* 39 Minn. 438; 12 *Am. St. Rep.* 663; 20 *Am. & Eng. Ency.* (2d ed.) 316; *Wig. on Ev.,* § 1354. See also *Berger, etc., Co. v. Zabriskie,* 75 N. Y. Supp. (City Ct.) 1038.

PREVIOUS STATE OF THE LAW. INABILITY TO CONSENT. Prior to the enactment of the act of 1870, above referred to, and before the statutes in relation to married women, there could be no lien against the lands of a married woman, for the erection of a building thereupon, with her acquiescence, because she was incapable of legally consenting. *Johnson v. Parker,* 3 Dutch. 239.

ESTATE BY ENTIRETY. After the married women's acts, but before this act of 1870; even if a married woman was enabled, by the former, to assent to a building on her lands, so as to make them liable to a lien; her consent must have been shown to have been, in fact, given; and the husband's sole contract, for the erection of a building on lands, of which they were seized by entirety, rendered his separate estate only liable to lien therefor. *Washburn v. Burns,* 5 Vroom 18.

EFFECT OF PRESENT ENACTMENT. ESTATE BY ENTIRETY. Whether the determination in *Washburn v. Burns,* will hold good since the act of 1870, may be questioned. It might be held, now, that the joint estate would be liable.

As to the MARRIED WOMAN'S KNOWLEDGE of the building, see *Kittredge v. Neumann,* 11 C. E. Gr. 195. See also *Dodge et al. v. Romain,* 18 Atl. 114 (E. & A.) in which it was held that when a building is erected on a married woman's land under a contract to which she is not a party, her knowledge that it was being erected is not to be inferred from the fact that she subsequently joined with her husband in conveying the land to the person who procured the building to be erected, and to whom

her husband had agreed, without her knowledge or authority, to convey the same, that subsequent ratification of his contract to sell being insufficient to impute to her his previous knowledge.

As the married woman's land is liable to lien in the case contemplated by the statute, it is just that she should have the benefit of the provisions of § 2, if the contract has been filed as has been accordingly held. It has also been held that she may be served with a stop notice, in such case, and is the proper person to be served. See *Gardner & Meeks Co. v. Herold*, 72 Atl. 24.

See also, generally, § 2 above, note 1, *Owner's signature to contract.*

Recorded or registered purchase money mortgages, which are also advance money mortgages, postponed to lien claims, to the extent of the moneys remaining unadvanced.

14. Whereas it is the practice of owners of lots or tracts of land to dispose of the same to a builder or builders, taking therefor a mortgage or mortgages in excess of the purchase money price of said lot or tract of land, the mortgagee agreeing to pay such excess to the aforesaid builders, from time to time, as the building or buildings progress, such mortgages being known as advance money mortgages; therefore, in all such transactions the building or buildings so erected shall be liable for the payment of any debt contracted and owing to any person or persons for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building or buildings and on the land whereon they stand, including the lot or curtilage whereon the same are erected, and the lien for labor performed or materials furnished for the erection and construction of any such building or buildings, shall be a prior lien to the lien of any mortgage created on such building or buildings and lot or tract of ground to secure either in whole or in part any advances in money to be used in and about the construction of such building or buildings, (*but to the extent only of the moneys remaining to be advanced by the mortgagee under such agreement; provided, such mortgage shall be recorded or registered before the filing of any claim in pursuance of this act*).

1898, p. 538, § 14; 1879, p. 77, § 1.

The words in parentheses were added by the revision of 1898, in lieu of the following words of the section, as originally enacted in 1879—"except only so much of the amount of said mortgage

as shall be for the purchase money of the lot or tract or land whereon the said building or buildings shall be erected; provided that nothing in this act shall interfere with a mortgage or mortgages to secure bona fide loans of money not advanced as aforesaid, such bona fide loans to be paid in full, anything in this act to the contrary notwithstanding.

1. ADVANCE MONEY MORTGAGES. It is well settled that a mortgage given to secure future advances, if duly registered or recorded, is good not only as against the mortgagor, but is entitled to priority over all encumbrancers whose liens attach subsequently to its creation, for all advances made prior to notice of such subsequent encumbrances, and also for all advances made prior to notice of such subsequent encumbrances, and also for all advances made after such notice when the mortgagee previous to such notice had obligated himself to make them. *Griffin v. New Jersey, etc., Co.,* 3 Stock. 49; *Trenton, etc., Co. v. Woodruff,* 1 Green Ch. 118; *Bell v. Fleming's Exrs.,* 1 Beas. 13; s. c., 1 Beas. 490; *Robinson v. Urquhart,* 1 Beas. 515; *Ward v. Cooke,* 2 C. E. Gr. 93; *Kline v. McGuckin,* 9 C. E. Gr. 411; *Taylor v. LaBar,* 10 C. E. Gr. 222; *Platt v. Griffith,* 12 C. E. Gr. 207; *Jacobus v. Mut., etc., Co.,* 12 C. E. Gr. 604; reversing s. c., 11 C. E. Gr. 389; *Lanahan v. Lawton,* 5 Dick. 276; *Central Trust Co. v. Continental, etc., Co.,* 6 Dick. 605; *Reed v. Rochford,* 50 Atl. R. 70; *Heintze v. Bentley,* 7 Stew. 562.

The notice must be actual, not merely constructive, *Ward v. Cooke,* supra; *Kline v. McGuckin,* supra; *Heintze v. Bentley,* supra; *Central Trust Co. v. Continental, etc., Co.,* supra; *Reed v. Rochford,* supra; and the obligation to make such advances, after actual notice of subsequently attaching liens, may be oral as well as in writing. *Platt v. Griffith,* supra; *Reed v. Rochford,* supra.

The rule thus established is as applicable to mechanics' lien claims as to any other kind of encumbrances. *Taylor v. LaBar,* supra; *Platt v. Griffith,* supra; *Jacobus v. Mutual, etc., Co.,* supra; *Central Trust Co. v. Continental, etc., Co.,* supra; *Reed v. Rochford,* supra; and it is immaterial whether the money is advanced for the building, for the construction of which mechanics' liens are claimed, or whether it is advanced, to the owner thereof, for any other purpose. *Taylor v. LaBar,* supra; *Platt v. Griffith,* supra; *Mackintosh v. Thurston,* 10 C. E. Gr. 242. See however, *Porch v. Agnew Co.,* 4 Rob. 328, where it was held that the holder of bonds, purchased, with a presently passing valuable consideration, from a *mortgagor,* though secured by a mortgage recorded before the commencement of the building and given to secure advances, is not entitled to priority over a lien claim when they were purchased, with knowledge that there were building liens which would have to be enforced because of the mortgagor's insolvency, and were not purchased in the open market.

Such being the law in regard to these mortgages it becomes next pertinent to inquire as to the scope and effect of the statute in regard to them.

SCOPE OF THE STATUTE. It is not every advance money mortgage that the section relates to; it only affects advance money mortgages which fall within the stautory terms and these very plainly require, that the mortgage shall be part of a transaction between the mortgagor and the mortgagee, whereby the mortgaged lands are conveyed by the latter to the former. Hence, the mortgagee must be the last previous owner of the land in every case, and the mortgage may, and we think always must, be a purchase, as well as an advance, money mortgage.

Furthermore, the terms of the statute include only such mortgages as are given to secure advances of money to be used in the construction of a building and to be made as such building progresses. It seems, therefore, not to include mortgages to secure advances for the alteration or reparation of a building, or for an addition thereto, or the removal thereof.

EFFECT OF THE STATUTE, AS TO EXTENT OF PRIORITY OF MORTGAGE. As originally enacted, the statute postponed every mortgage which was within its scope, to all lien claims, except so far as such mortgage secured the purchase price of the land, even although the mortgagee had advanced the rest of the moneys it was given to secure, and they had been actually devoted to the payment of materialmen and laborers for the construction of the building. *New Jersey, etc., Co. v. Bachelor,* 9 Dick. 600; *Mutual, etc., Co. v. Walling,* 6 Dick. 99.

Soon after the decision of this last cited case, the statute of 1895, p. 313, was enacted, the sixth section of which, as was said in *Binns v. Slingerland,* 10 Dick. 55, modified the act of 1879, by providing that every mortgage, registered or recorded before the filing of a lien claim, should have priority over any such claim to the extent of the moneys actually advanced by the mortgagee and applied to the erection of any new building, or any alterations, repairs, or additions to any building on the mortgaged lands. This section of the act of 1895 is retained, without any material change, as section 15, of the present revision; and the revisers, in framing the present draft of section 14, now under consideration, omitted the words which stood at the end of the original act of 1879, and added those which now take their place, obviously on account of the provisions of section 15, but with what precise intent or effect is perhaps uncertain.

This uncertainty arises from the fact that § 14 gives the mortgage priority to the extent of the moneys advanced by the mortgagee for the building, while § 15 makes the extent of the priority depend also on the fact that the money advanced *has been actually applied* to the erection, etc., of the building. In the light or the decisions which hold that the language of § 1, gives a lien for materials furnished, whether they are actually used or not (see § 1, note 2); it can hardly be said that this difference, in the wording of §§ 14 and 15, is unimportant; and it may be, therefore, that a mortgage, which falls within the scope of § 14, under certain circumstances, namely, where the mortgagee has, bona fide, advanced the money for the building, but the builder has failed

to apply them thereto, will have priority to the extent of such advance, when, under the same circumstances, a mortgage within the scope of § 15, but not within § 14, would be denied priority to the like extent.

In view of the previous course of the legislation in the matter, there is a violent presumption of common sense, that the legislature did not wittingly intend any such result, in enacting the present revision; and so, it may be held, that such is not the true construction of these sections, but that the true construction is, that the extent of the priority of mortgages, within the scope of § 14, is to be determined by the provisions of § 15, and that the office of the words, at the end of § 14, is merely to remove any doubt of the application of § 15, according to the full generality of its terms. This construction might be open to the criticism, that it goes far to render the whole fourteenth section entirely superfluous and useless, were it not for the matter to which we now direct attention:

A CLAIM WITHIN THE TERMS OF THIS SECTION MAY BE GOOD ALTHOUGH THE OWNER NEITHER CONTRACTED THE DEBT, NOR EXPRESSLY CONSENTED TO THE BUILDING. The statute says that, in all the transactions which it describes, "the building so erected shall be liable for the payment of any debt contracted, etc., which debt shall be a lien on such building or buildings and on the land, etc."

In *Mutual, etc., Co. v. Walling,* 6 Dick. 99, it was intimated that these words might be omitted, in reading the statute, as mere expletive, and that may have been true for the purposes of that case; but they are not omitted by the legislature in its revision, and there is a presumption that they are neither superfluous nor ineffective. It may be held, therefore, that they afford a reasonably clear indication of a legislative purpose, to make the case, which the section describes, an exception to the generality of § 7, and to give materialmen and laborers a lien against the estate of the vendor, notwithstanding the want of his consent, whenever such claimants can show that these claims have arisen under such special circumstances. Such was the effect given to substantially the same words in the act of 1883, p. 24 (quoted under § 10, ante), by the Court of Errors and Appeals in *American Brick Co. v. Drinkhouse,* 30 Vroom 462; as was pointed out in *Murphy v. Hussa,* 40 Vroom 381.

Some support for this view may be also found in the fact that, on any other hypothesis, the vendor and builder, in the precise case to which the statute applies, by making the delivery of the deed at a date later than the time within which any lien could be filed, could render the statute entirely inefficacious. On the other hand, it may be said that, on the hypothesis, above suggested as a possibility, the lien of a claimant would affect the vendor's estate prior to the mortgage, and so be prior to the latter, even in respect of its quality as a purchase money mortgage. But to this it may be answered that the mortgage, in that respect, might have effect, by relation, from the time the bargain was made,

Jacobus v. Mutual, etc., Co., 12 C. E. Gr. 604; and that, if this would not be so as to lien claimants, without notice of such bargain; the vendor could protect himself, in that behalf, by having the bargain in writing and recorded.

All recorded or registered mortgages, to the extent of the moneys actually advanced and applied to the erection, alteration, or repair of, or the addition to, a building, are prior to lien claims.

15. Every mortgage given or to be given upon lands in this state shall have priority over any claim that may be filed in pursuance of this act to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged lands or any alterations, repairs or additions to any building on said lands; provided, such mortgage be registered or recorded before the filing of any such claim.[1]

1898, p. 538, § 15; 1895, p. 313, § 6; see also § *28 post.*

The section is substantially identical with the original enactment of 1895.

1. SCOPE OF SECTION. Some discussion of this matter, and of the rule in regard to the priority of advance money mortgages, in the absence of statutory regulation thereof, is made in the note to the previous section (14). It may here be pointed out, that this section applies to all mortgages, but that it applies to them, in its terms, only in respect of their quality as advance money mortgages; that is, on the one hand, the section cannot limit the priority of mortgages other than, or so far as they are other than, advance money mortgages, *Reed v. Rochford,* 50 Atl. R. 70; and, on the other hand, it cannot limit the priority of a lien claim, in respect of encumbrances other than advance money mortgages. As already noted under § 10, supra, the question of priority, as between lien claims and various other encumbrances, involves an analysis of that section as well as of this section, and § 28, which is attempted in our note 2 to § 28, which see.

WHEN ADVANCES MUST BE MADE. The statute gives a mortgage priority for advances actually made and applied, etc., but is silent as to the time within which they must be made, in order to secure such priority. Under the rule mentioned in the note to § 14, a mortgagee who has obligated himself to make advances, will be protected as to such advances although made after actual notice of the claims of others, and so it would seem that the time, within which the advances can be made with safety,

as against lien claims, is not determined by the filing of lien claims.

When a mortgage is given to secure moneys advanced and actually used for the erection of a building, such mortgage will be prior in lien to lien claims filed after it is recorded, although the moneys are advanced as the building progresses and the mortgage was executed after the building was begun. The priority given by the section is given whether the mortgage is given to secure future advances or money already advanced. *Young v. Haight,* 40 Vroom 453, citing *Erdman v. Moore,* 29 Vroom 445, and noting that it is not in conflict with the above holding inasmuch as it decided a case arising before 1895.

But a mortgagee who claims priority because his mortgage was recorded before any lien claim is filed must prove that the loan thereby secured has been advanced for, and applied to, the erection of the new building. *Porch v. Agnew Co.,* 4 Rob. 328. He does not show that by showing that he was himself the builder and took the mortgage pending the progress of his work, to secure the payment of his contract price. *Stiles v. Galbreath,* 3 Rob. 222; s. c., aff. 1 Buch. 299.

Lien claim to be filed within four months. Such claim to contain: 1. Description of building and curtilage; 2. Owner's name and estate; 3. Contractor's name; 4. Bill of particulars of amounts, prices, dates, credits, etc. Particulars in case of contract. Claim to be verified. Effect of misstatements in bill of particulars.

16. Every person intending to claim a lien under the provisions of this act, shall within (*four months,*) after the labor is performed or the materials furnished[1] for which such lien is claimed, file his (*or her*) claim in the office of the clerk of the county where the building and land subject to such lien is situate,[2] which claim shall contain:

I. A description of the building and of the lot or curtilage upon which the lien is claimed, and of its situation sufficient to identify the same;[3]

II. The name of the owner or owners of the land or of the estate therein on which the lien is claimed;[4]

III. The name of the person who contracted the debt, or for whom, or at whose request the labor was performed or the materials furnished for which such lien is claimed, who shall be deemed the builder;[5]

IV. A bill of particulars exhibiting the amount and kind of labor performed and of materials furnished, and the price at which and times when the same was performed and

furnished, and giving credit for all the payments made thereupon and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant,[6] which statement, when the work or materials or both are furnished by contract, need not state the particulars of such labor or materials further than by stating, generally, that certain work therein stated was done by contract at a price mentioned;[7] and such bill of particulars and statements shall be verified by the oath of the claimant or his agent in said matter, setting forth that the same is for labor done or materials furnished in the erection of, (*addition to, repair of, or alteration in or of*) the building in such claim described, at the times therein specified, and that the amount as claimed therein is justly due; and when such claim shall not be filed in the manner or within the time aforesaid, or if the bill of particulars shall contain any willful or fraudulent misstatement of the matters above directed to be inserted therein, the building or lands shall be free from all lien for the matters in such claim.[8]

1898, p. 538, § 16; 1853, p. 437, § 6; Rev. 1874, § 11; 1877, p. 153; 1878, p. 243; 1895, p. 313, § 4; 1896, p. 198.

With the exception of the words above included in parentheses, this section is practically the same as originally enacted in 1853, and re-enacted in the Revision of 1874.

In 1877 some material changes were made; that is, that act required the claim to state the true date when the building was begun, and concluded the claimant by his statement of it, while invalidating his lien, for any willful or fraudulent misstatement of it. It also changed the requirement, that the claim should state the name of the owner "of the land or of the estate therein on which the lien is claimed" to the requirement that it should state the name "of the owner of the estate therein," etc. The act of 1878, however, restored the section to its original form in all respects, with the slight change of the insertion of the words—"or her," noted in parentheses above.

The act of 1895 provided that no claim should be a lien unless the claim was filed within four months after the date of the last work done, etc., nor should it be enforced unless suit should be begun within 90 days after the last work done, etc. The act of 1896 corrected the anomaly of the act of 1895, by fixing the same limitation period, four months, for both the lien claim and the suit. The present revision adopts this limitation period of four months, and inserts the words—"addition to, repair of or alteration in or of," above noted in parentheses; otherwise, as above stated,

the section is practically the same as it was in 1853 and has stood substantially ever since.

1. LIMITATION The statute plainly says that the lien claim is to be filed *after* the labor is performed or the materials furnished for which claim is made. It requires the lien claim to set forth verified statements, *inter alia,* showing that such is the fact. It would seem plain, therefore, that no lien can validly include any item that has not been, in fact, furnished prior to the time it is filed. It is said in *Derrickson v. Edwards,* 5 Dutch. 468, at p. 470, speaking of an entire contract, that "the work and materials" (for which it provided) "cannot be considered as furnished until the whole contract was completed." When, therefore, in *Edwards v. Derrickson,* 4 Dutch. 39, at p. 68, it is said that "if the whole contract price was payable in advance the lien claim need not be filed till the contract is complete," it is surmised that it should have been said, not that the lien claim need not, but that it could not, be filed till the contract is complete. In other words, it is apprehended that if a lien claim is filed before the contract works are completed, it is an invalid claim and the subsequent completion of the works will not help it any. It may be that, when a contract provides for payments in instalments as the work progresses, a lien claim can be well filed for one or more of such instalments as soon as earned, but the lien need not, and ordinarily should not, be filed, in such a case, until the contract work is complete. (See *Edwards v. Derrickson,* 4 Dutch. 39, at p. 68, and at the end of this note, as to the number of items which together make one indebtedness). In the case last cited, at p. 68, it is further said that "when the entire contract price is payable at the conclusion of the work — — no lien can be filed until the contract is completed *and the debt due.*" The last phrase of this quotation, which we have italicized, was obviously spoken obiter, and it is hardly likely that it was intended to assert that a lien could not be filed until the indebtedness is legally demandable. In many cases a claimant is entitled to demand his pay as soon as he has completed his work; and, in such cases, to say that he cannot file a lien until his debt is due and demandable is to say no more than that he cannot file his lien until he has completed his work. But, where, as frequently happens, the work is done under a contract which provides for an architect's certificate, or the production of releases or the like before the contract price is payable, it may well be considered that a lien claim can be safely filed as soon as the work is completed, and the compensation has really been earned (and in that sense may be said to have become due); although the architect's certificate is not obtained, or some other condition precedent is not performed, until thereafterwards.

It is true that the suit to enforce the lien may be defeated if *it* be begun before there has been a performance of such condition precedent, or before its non-performance has become legally excused (see note 1 under § 23, post); but as such a defense may be waived by the defendant's omission specially to plead it, it seems

quite obvious that a special plea would be bad which alleged the non-performance, not before suit begun, but merely before the lien claim was filed.

A lien claim, of course, cannot be filed for a debt which became due more than four months prior to the time it is filed. But where a number of items together make one indebtedness, and this is so whenever, in fact, the parties intended that result, the debt becomes due on the date of the last item; so that the provision of § 18, which requires the lien to be filed within four months from the date of the last work done or materials furnished (which provision must be read together with the present section), entitles the claimant to file a claim for the whole amount of such indebtedness within such four months. *Downington, etc., v. Franklin Mills,* 34 Vroom 32; *Bell v. Mecum,* 68 Atl. 149 (E. & A.). Whether the various items of a claim do constitute one entire debt or not is for the jury to say, when there is evidence pro and contra. *Bell v. Mecum,* supra. The last day for such filing is, probably, the day of the fourth month corresponding to the date of the last item, *Faith v. McNair,* 13 N. J. L. J. 44.

Any *substantial* work in pursuance of a contract is work from the date of which the time within which to file a lien claim may be reckoned. *Federal Trust Co. v. Guigues,* 74 Atl. 652. See also note 6, post, stating date, etc.

WAIVER OF LIEN by taking notes, etc., see section 1, note 3.

LOSS OF LIEN BY LACHES. Although a lien claim may be filed and sued upon in due season, it may be lost through the laches of the claimant. For example—A prior mortgagee is not bound to take notice of such a lien until the claim is filed; and, hence, a claimant, who has not filed his claim until after a suit to foreclose such a prior mortgage is begun, and so is not made a party thereto, and who does not then apply to be made a party, will be cut off by such foreclosure. *Raymond v. Post,* 10 C. E. Gr. 447; *Gerard v. Birch,* 1 Stew. 317.

2. THE OBJECT OF FILING a lien claim is to give interested parties notice. *Vreeland Co. v. Knickerbocker Co.,* 68 Atl. 215 (E. & A.).

The validity of a lien claim is not affected by the fact that a mortgagor, after getting his loan, procured such claims to be filed, without disclosing to his mortgagee, at the time the latter loaned him the money, that there were any such claims which could be filed. *Gordon v. Torrey,* 2 McCart. 112.

3. DESCRIPTION OF BUILDING. If it does not appear that the materials were supplied for a designated building, a lien claim is nevertheless good if it does appear that they were supplied to the defendant who, in fact, did use them for the building specified in the lien claim. *Morris County Bank v. Rockaway Mfg. Co.,* 1 McCart. 189.

DESCRIPTION OF CURTILAGE. The omission of this description from a lien claim would be fatal, unless cured by amendment. *American Brick Co. v. Drinkhouse,* 29 Vroom 432.

If the description is incorrect, it may be altered on application. See, as to this, § 20, post, and section 21 post.

APPORTIONMENT OF CLAIM. As to this, in the case of separate buildings on distinct lots, see § 22, post.

4. OWNER'S NAME. The owner's name must be specified. The lien claim cannot bind any interest or estate other than that of the person named as owner therein. But a misnomer is undoubtedly amendable, in the absence of good reason for refusing it. *Vreeland Co. v. Knickerbocker Co.*, supra.

CHANGE OF TITLE. Where the title changes before the lien is filed, the owner, at the time it is filed, is the person to be named, in the lien claim, as owner. *Edwards v. Derrickson*, 4 Dutch. 39; s. c., 5 Dutch. 468; *Robins v. Bunn*, 5 Vroom 322; *Slingerland v. Lindsley*, 1 N. J. L. J. 115; *Erdman v. Moore*, 29 Vroom 445. If the owner convey after contracting for the building, the right of lien is not thereby lost or impaired. *Edwards v. Derrickson*, 4 Dutch. 39; 5 Id. 468; *Bates Co. v. Trenton Co.*, 41 Vroom 684 (E. & A.); *Stewart Co. v. Trenton Co.*, 42 Vroom 568 (E. & A.).

A mortgage does not effect a change of ownership. *Gordon v. Torrey*, 2 McCart. 112.

DESCRIPTION OF ESTATE. The act does not required the estate to be specified, but only the owner's name. *Cornell v. Matthews*, 3 Dutch. 522.

OWNERS OF ESTATES BY ENTIRETY. Although the claim is against the estate of the husband only, it is proper that the lien claim should name both husband and wife as owners. *Washburn v. Burns*, 5 Vroom 18.

OWNERS OF EQUITABLE ESTATES. See, under § 1, note 5, Equitable Estates.

OWNERS OF TERMS FOR YEARS. A lien, for alterations made by a tenant, can be claimed only against such tenant, as owner. *Corcoran v. Jones*, 12 N. J. L. J. 38.

5. BUILDER'S NAME. In case the true builder has not been named in the lien claim, the claimant cannot have a recovery, without amendment. *Bartley v. Smith*, 14 Vroom 321.

6. BILL OF PARTICULARS. The statute should be strictly followed, in all these particulars; and a charge for labor must not be blended with one for materials. A claim is not necessarily bad, for including illegitimate, as well as legitimate, items; for it may stand, quoad the good items; but if the good and the bad items are inseparably blended, the claim will be bad. *Associates v. Davison*, 5 Dutch. 415; *Edwards v. Derrickson*, 4 Dutch. 39; *Whitenack v. Noe*, 3 Stock. 321; *Jacobus v. Mutual Benefit*, 12 C. E. Gr. 604.

THE COST OF HAULING engines from the freight station to their site in the power house under erection is properly included in the claim, when the duty to haul them was part of the contract to erect them. *Bates Co. v. Trenton Co.*, 41 Vroom 684.

STATING ITEMS FOR REPAIRS AND ALTERATIONS. A claim may properly include items for repairs (and now for alterations and repairs), as well as for construction; but, as the priorities of claims for repairs (or now for repairs or alterations), and those of claims for construction, depend upon different facts, the lien claim, in each case, should distinguish the items for repairs or alterations from its other items. *James v. Van-Horn*, 10 Vroom 353; *Burd v. Huff*, 17 N. J. L. J. 80. Where the lien claim is for repairs and the proof in the suit is that the bill is for erection of a new building, there is a fatal misdescription. *Cox v. Flanagan*, 2 Atl. 33 (Bird, V. C.).

STATING DATE WHEN THE WORK, ETC., WERE SUPPLIED. The statute does not require that the time when the building was begun shall be stated in the lien claim, *Gordon v. Torrey*, 2 McCart. 112; but it *does* require that the date when each item of work was done and each item of materials was furnished should be stated, *American Brick Co. v. Drinkhouse*, 29 Vroom 432; *and the date of the last item, as given in the lien claim*, is the date from which is to be reckoned, the time within which suit to enforce the lien must be begun. And if, in fact, such date is given in the lien claim, as earlier than it was in fact, the date, as thus given, and not as it really was in fact, will control. *Bement, etc., v. Trenton Co.*, 2 Vroom 246; s. c., 3 Vroom 513.

7. STATING CONTRACT WORK. When the claim is for a contract job, the bill of particulars is sufficient if it states the kind of labor and materials, the fact that they were done and furnished, under contract, prior to a given date, and the contract price. *Edwards v. Derrickson*, 4 Dutch. 39; *Williamson v. N. J., etc., R. R. Co.*, 1 Stew. 296; *Associates, etc., v. Davison*, 5 Dutch. 415, 421.

8. AMENDMENTS. A lien claim is not a part of the files or records of the Circuit Court and so, prior to the statutes, embodied below in §§ 19 and 20, there was no way of amending any defects in a lien claim, after it was filed; as the powers of the Circuit Court to grant amendments does not extend beyond its own files and records. *Vreeland v. Boyle*, 8 Vroom 346. The provisions of the sections, above mentioned, under which amendments may now be made, should be carefully examined.

"There is nothing in the spirit or letter of the act that renders an error made in stating the name of the owner fatal to a SUBSEQUENT ATTEMPT, EITHER BY AMENDMENT OR BY FILING A SEPARATE CLAIM, to reach estates or interests owned by parties other than him who was named as owner in the claim first filed." *Vreeland Co. v. Knickerbocker Co.*, 68 Atl. 215 (E. & A.).

A lien claim against a corporation, as owner, which has been declared insolvent and for which a receiver has been appointed, may be defective for not naming the receiver as owner; but if so, the defect is amendable, and equity will deal with it as though

amended, if there is no equitable ground for doing otherwise. *Doty v. Auditorium Co.*, 56 Atl. 720; s. c., aff. 20 Dick. 768.

Lien docket in County Clerk's office, to show: 1. Owner's name; 2. Contractor's name; 3. Description of building and curtilage; 4. Amount of claim, and claimant's name. Index. Fees.

17. Every county clerk shall, at the expense of the county, provide a suitable, well-bound book, to be called the lien docket, in which, upon the filing of any lien claim, he shall enter:

I. The name of the owner of the building and land upon which the same is claimed;

II. The name of the builder or person who contracted the debt;

III. The description of said building and lands;

IV. The amount claimed and by whom claimed.

And the said clerk shall make a proper index of the same, in the name of the owner of the land and building; and such clerk shall be entitled to twelve cents for filing each claim, or contract, and at the rate of eight cents per folio for such entry made in the lien docket, and six cents for every search in the office for such lien claim, or contract.

1898, p. 538, § 17; 1853, p. 437, § 7; Rev. 1874, § 12.

This section is practically the same as when first enacted, as § 7 of the act of 1853, and subsequently embodied in the Revision of 1874, as § 12.

The following act, 1904, p. 243, is here inserted. It is, in effect, supplemental to § 17.

"1. It shall be the duty of the clerks, registers and other officers who are now obliged by law to receive and record deeds, mortgages, bills of sale and other conveyances, or whose duty it is to enter, file or record judgments, decrees, mechanics' lien claims, attachments, recognizances, sheriff's bonds or other liens and encumbrances on real estate in this State to keep, in addition to the entry and record of the same already provided by law, an exact record of the hour and minute when the same shall be filed, entered or recorded in their respective offices, and such entry, filing or recording shall be deemed to take effect and be notice thereof from and as of the exact time of the actual entry, filing or recording of the same, and such record, filing or entry in the office of every clerk, register or other officer in this State shall be prima facie evidence in all courts and places of the exact time of such record, entry or filing."

Lien claim must be filed and summons must be issued within four months from the date of last item of claim: time of issuance must be endorsed on lien claim: suit must be prosecuted diligently: extension of time for prosecution by agreement filed and noted.

18. No debt shall be a lien by virtue of this act, unless a lien claim is filed as hereinbefore provided, within (four months) from * *the date of the last work done or materials furnished for which such debt is due;* * nor shall any lien be enforced by virtue of this act unless the summons in the suit for that purpose shall be issued within A *four months* A from the date of the last work done or materials furnished in such claim;[1] and the time of issuing such summons shall be endorsed on the claim by the clerk upon the sealing thereof, and if no such entry be made within four months from such last date,[2] § *or if such claimant shall fail to prosecute his claim diligently within one year from the date of issuing such summons or such further time as the court may by order direct,*[3] § such lien shall be discharged, A *and all suits now pending where a claim has been filed and a summons issued within four months from the date of the last work done or materials furnished for which said debt is claimed shall be included within the provisions of this act;* A provided, that the time in which such lien may be enforced by summons may be extended for any further period, not exceeding four months, by a written agreement for that purpose, signed by said land-owner and said claimant, and annexed to the said claim on file before such time herein limited therefor shall have expired, in which case the county clerk shall enter the word "Extended" in the margin of the lien docket opposite such claim, and any claimant, upon receiving written notice from the owner of the lands or building requiring him to commence suit on such claim within thirty days from the receipt of such notice, shall only enforce such lien by suit to be commenced within said thirty days.[4]

1898, p. 538, § 18; 1853, p. 437, § 12; Rev. 1874, § 13; 1888, p. 423; 1895, p. 313, § 4; 1896, p. 198.

—— In the acts of 1853, the Rev. of 1874, and the act of 1888, the words here were—"the furnishing the materials or performing the labor for which such debt is due, and such part

of any claim filed as may be for work or materials furnished more than one year before the filing of the same, shall not be recovered against the building or land by virtue of this act."

All of these acts also made the period of limitation, for filing the lien and bringing suit, one year. This period was reduced to four months by the acts of 1895 and 1896 (see note to § 16 above).

The act of 1888 was the first enactment to insert the provision, indicated above between the section marks §—§, making the period three years, which was then reduced to one year by the act of 1895. The words between the carets ʌ—ʌ were first inserted by the act of 1896. With these exceptions, this section, as it now stands, has been the law since 1853.

By the act of 1910, page 229, the above section was amended to read as follows:

No debt shall be a lien by virtue of this act unless a lien claim is filed as hereinbefore provided within four (4) months from the date of the last work done or material furnished for which such debt is due; nor shall any lien be enforced by virtue of this act unless the summons in the suit for that purpose shall be issued within four (4) months from date of the last work done or materials furnished in such claim; and the time of issuing such summons shall be endorsed on the claim by the clerk upon the sealing thereof, and if no such entry be made within four (4) months from such last date, or if such claimant shall fail to prosecute his claim diligently within one (1) year from the date issuing such summons, or such further time as the court may by order direct, such lien shall be discharged, and all suits now pending where a claim has been filed and a summons issued within four (4) months from the date of the last work done or materials furnished for which said debt is claimed shall be included within the provisions of this act; *provided,* that the time in which such lien may be enforced by summons may be extended for any further period, not exceeding four (4) months, by a written agreement for that purpose, signed by said landowner and said claimant, and annexed to the said claim on file before such time herein limited therefor shall have expired, in which case the county clerk shall enter the word "Extended" in the margin of the lien docket opposite such claim, and any claimant, upon receiving written notice from the owner of the lands or building requiring him to commence suit on such claim within thirty days from the receipt of such notice, shall only enforce such lien by suit to

be commenced within said thirty days; *provided, further,* that when any suit is brought in any district court on such lien claim, it shall be the duty of the plaintiff, or his attorney, to obtain from the clerk of such district court a certificate to the effect that a suit has been commenced in such district court on such lien claim, specifying the court where the suit is brought, the day and year when such suit was commenced, and the day and year when the summons is made returnable, which said certificate the plaintiff or his attorney shall present to the clerk of the county in which such lien claim is filed within four (4) days after issuing of summons; it shall thereupon be the duty of the clerk of said county to endorse upon such lien claim that a suit has been commenced on the same, specifying the court where suit is brought, the day and year when summons was issued, and when such is made returnable.

See also under § 23 post for the other new legislation in this same connection. The following notes were prepared before this amendment was adopted.

1. See § 16, note 1, and note, that the date of the last item, as given in the lien claim, fixes the time to reckon from even although the date so given is earlier than the true date actually was. *Bement v. Trenton Co.,* 2 Vroom 246; s. c., 3 Vroom 513.

2. In *James v. Van Horn,* 10 Vroom 353, it was said; and in *Hall v. Spaulding,* 11 Vroom 166, it was held, that only such persons as could be prejudiced, by the omission to endorse on the lien claim the date when the summons was issued, could object to such failure, and that, therefore, as to them, a judgment would be valid where the endorsement was made after the expiration of the statutory period, or even where no endorsement, prior to judgment, was made. These cases must be deemed to have been overruled, by the Court of Errors, in *Wheeler v. Almond,* 17 Vroom 161, which held, that the failure to endorse on the lien claim the date of the summons, within the statutory period (then of one year now of four months from the date of the last work done), or within thirty days after due notice to sue, discharges the lien as effectually as payment of the debt; and that the power of amendment conferred by §§ 19 and 25, cannot be invoked to cure such failure; because the endorsement is intended, by the statute, to be a notice, on the files of the county clerk, that the remedy is being pursued, but is no part of the lien claim, or of the proceedings, by suit, to enforce it. See also *Cox v. Flanagan,* 2 Atl. 33 (Bird, V. C.), to the effect that such endorsement cannot be made after the summons has been issued, which is clearly

contrary to the decision in *Wheeler v. Almond,* and the plain words of the statute.

See § 31, clauses III. and IV., for the provisions which require the endorsement to be made within thirty days after notice to sue has been given.

3. The construction of this clause of the statute was the subject of consideration in a case in the Court of Errors and Appeals, *Ennis v. Eden, etc., Co.,* 48 Atl. R. 610; which merits careful attention. The case came into the Court of Errors on a writ of error to the Morris Circuit, and presented, for review, the record of a judgment on a lien claim entered, by default, sixteen months after the suit was begun and thirteen months after the right to enter such judgment had accrued. After the judgment was entered, an application to open it was made, on the ground that it had been entered, after the lien had been discharged, by lack of diligent prosecution. This application, which was made in the name of the defendant corporation, which was both builder and owner, was denied after due hearing, on rule to show cause and proofs taken thereunder.

The record of the judgment, and the outbranches brought up with it, showed the following facts, besides those already above related: On the day the summons was issued, but after it was served, the defendant went into the hands of a receiver, appointed by the Court of Chancery of this State. The receiver did not dispute the correctness of the indebtedness to the plaintiff, but admitted it, and subsequently, on selling the lands of the defendant, gave the purchaser notice that they were sold subject to the lien claim of the plaintiff. The plaintiff was at no time enjoined from prosecuting his suit, but did not do so, because he thought it unnecessary, in view of the fact, that the amount of his claim was undisputed by the receiver, who had also adjusted the dividend that would be due on it. Nearly thirteen, and more than twelve, months after suit was begun, the plaintiff, on a verified petition of the facts, obtained, exparte, an order extending the time for prosecution, and entered his judgment within the time so extended.

On this case, the majority of the court held that the judgment must be affirmed, and four of the Justices (Dixon, Collins, Bogert and Voorhees), dissenting, held that it ought to be reversed.

Two opinions were filed, one by Justice Depue, representing the majority of the court, and a dissenting opinion by Justice Dixon. It is conceded, in both opinions, that the judgment could not stand, if the facts showed that the plaintiff had failed to exercise reasonable diligence in prosecuting his suit; and that the only lack of diligence that it could be claimed he had been guilty of, was his failure to enter his judgment within the year. This in the opinion of the minority, was a failure to exercise due diligence, while in the opinion of the majority it was not, for the reason that, inasmuch as the receiver was empowered to adjust such claims without requiring them to be passed into judgment. *DeMott v. Stockton, etc., Co.,* 5 Stew. 124; and, inasmuch as the

judgment would have effected nothing beyond the ascertainment of the debt, which was undisputed, since an attempt to enforce it by execution would have been, undoubtedly, enjoined; the entry of the judgment would have been an idle and nugatory act.

The following abstract of the two opinons given in the case will be found, we think, helpful:

JUSTICE DEPUE'S OPINION.

The statute requires an order, allowing further time, to be made while the lien claim was still in force and undischarged: it cannot authorize the court to revive a lien claim which by force of the act has expired. No reason exists for straining the construction of the act so as to extend to the lien claimant, in the prosecution of his suit, unlimited time at the discretion of this court. "It is quite possible that the section may be so construed as to allow the owner of the land, after the expiration of the year, to have from the Circuit Court an order fixing a time within which the claimant shall prosecute his claim, where he has prosecuted it diligently but not successfully within the year. But this is not before us for decision."

The inquiry in this case is whether the plaintiff's failure to enter judgment discharged the lien. That is, was it a failure diligently to prosecute his suit within the year, within the meaning and intent of the statute. "That presents a question of fact, to be found in the first instance by the Circuit Court."

"The Circuit Court would have no power to make an order that the lien was discharged for want of diligence in the prosecution of the suit. That question is one of fact upon which the claimant is entitled to go to the jury."

We think the non-entry of the judgment under the circumstances of the case, was the course which a reasonably prudent man would have pursued, and that, therefore, the plaintiff has not failed in diligence.

JUDGE DIXON'S OPINION.

The statute means that the claimant shall prosecute his claim with such diligence as to obtain judgment within the year.

The reasonable implication is that an extension order may be made when it is shown that notwithstanding diligent prosecution of the claim, judgment has not been obtained within the year, which may be shown after the year has ended.

The statute gives the claimant one year after issuing summons in which to enter judgment; if he does not enter it within that year, then he must show to the court that he has diligently prosecuted his claim, and thereupon, the court may by order direct that he have further time in which to enter judgment. If judgment be not entered within the year (when there is no such order), or within the time limited by an order legally made, when there is one; the lien is discharged.

After the expiration of the year or of the period limited by order, the defendants interested in the land may secure conclusive

evidence that the lien is discharged by moving to non pros the claimant, as to the lien, a motion which must prevail unless the claimant, by proof of due diligence, show himself entitled to more time. Without an order for further time, a judgment by default, entered after the year's lapse, would be, on its face, illegal, as it would have awarded a lien which by the statute had been discharged.

But such a judgment entered within the time limited by an order taken after the lapse of the year would, on face be good and could be reversed only by its appearing that the order was improperly allowed. This is what appears in this case and so judgment should be reversed.

A careful consideration of the case justifies the following propositions:

PROPOSITION 1.—LAPSE OF TIME ALONE DOES NOT CONSTITUTE LACHES. The failure of the plaintiff, to enter a judgment within the year, does not discharge the lien; when facts appear which show that such failure was not a lack of due diligence.

PROPOSITION 2.—JUDGMENT BY DEFAULT. FACTS TO OVERCOME APPARENT LACHES HOW MADE TO APPEAR. When a judgment by default is taken, after the lapse of a year, but within the period limited by an extension order, made also after the lapse of the year, and granted, ex parte, on a verified petition, setting forth facts which show that the delay, in not entering such judgment, was the course a reasonably prudent man would have pursued; the facts necessary to show that the plaintiff's delay was not a lack of due diligence, do appear.

PROPOSITION 3.—WHAT LACHES DISCHARGES LIEN. If the plaintiff's judgment is not entered within the year, because of his lack of due diligence, in fact; the lien is thereby discharged.

PROPOSITION 4.—LIEN ONCE GONE CANNOT BE RESTORED. If the lien is, in fact, discharged, by the plaintiff's lack of due diligence, in prosecuting his suit, it cannot thereafter be restored, or resuscitated, by any order, or action, of the court.

PROPOSITION 5.—LIEN NOT DISCHARGED BY LACHES DURING THE YEAR. The failure of the plaintiff to take any proceeding in the suit as soon as he reasonably could do so, is not such a lack of due diligence as will discharge the lien, prior to the lapse of the year.

A lack of such diligence, such as the failure to bring on the trial at the next term after issue joined, may, by causing a non suit, indirectly operate to defeat the lien within the year, but that is, of course, a different thing.

The foregoing propositions, we think, were all ruled in the case. We append the following propositions and quaeres, as of interest.

PROPOSITION 6.—LACHES A QUESTION OF FACT FOR THE JURY. The question whether the plaintiff's failure to enter judgment within the year is, or is not under all the

circumstances of each case, a failure of due diligence, is a question of fact on which the plaintiff, and the defendants interested in the land as well, are entitled to have the verdict of a jury, when there is any evidence that it was not such failure. This, as we think, the case probably rules.

PROPOSITION 7.—VALIDITY OF JUDGMENT BY DEFAULT ENTERED AFTER THE YEAR WITHOUT ORDER. A judgment entered by default after the lapse of the year, with no extension order first taken, is bad on its face, as to the land, as having been entered after the lien has presumably been discharged.

This the dissenting opinion asserts. It may be true, as the contrary does not appear to be ruled in the case. But so also, it may not be true, as there appears to be some intimations in Justice Depue's opinion, that beyond allowing an order to the land owner, fixing a time within which the plaintiff shall prosecute his case or be non-suited, the Circuit Court cannot make an order after the year has elapsed. If this be so, it would of necessity, follow that a judgment by default, in the given case, would *not* be bad, on its face. But assuming the contrary to be the law, then—

PROPOSITION 8.—EFFECT OF EXTENSION ORDER TAKEN AFTER YEAR'S LAPSE. As a corollary of Proposition No. 6, the only office of an extension order, granted after the year has elapsed, is to make a subsequent judgment by default appear, on its face, to have been legally entered.

This is so on the hypothesis assumed, because where a delayed judgment is taken upon trial and verdict, such an order could not preclude a trial of the issue of the plaintiff's laches, nor could it operate as evidence to prove such issue in the plaintiff's favor.

QUAERE 1.—EFFECT OF ORDER TAKEN BEFORE YEAR'S LAPSE. Does an extension order taken before the year's lapse operate to preclude any question of the plaintiff's laches if the judgment is thereafter entered within the time limited thereby?

QUAERE 2.—SECOND ORDER. Before the expiration of one extension order, can a second one be taken?

QUAERE 3.—ORDER TO DISCHARGE LIEN FOR LACHES. Has the Circuit Court power to make an order dischaging the lien for lack of diligence in prosecution of the suit?

This is denied in the opinion of Justice Depue and asserted in the dissenting opinion. It does not seem to have been ruled in the case.

In *Doty v. Auditorium Co.*, 56 Atl. 720; aff. 20 Dick. 768, as in *Ennis v. Eden,* supra; and *DeMott v. Stockton Co.*, 5 Stew. 124, it was held that when a claimant has duly filed his claim, naming an insolvent corporation as owner, or the receiver thereof, he need not bring suit, to establish his claim, unless notified to do so; even although the receiver rejects his claim, instead of admitting it as in the two cases cited. It is held that it is enough for him, in such case, to present his claim to the receiver, and pursue his rights by appeal to the Court of Chancery, if they be disregarded.

It was also held that he must be given preference in such case, for his lien, although he does not, in presenting his claim to the receiver, show that he has filed a lien claim, if his claim filed with the receiver shows that it is for work for which he was entitled to a lien, and if, in fact, he did duly file a lien claim therefor. It was also held that such claimant's right of priority attaches to the proceeds of the sale of the premises, and is not affected by the fact that they were sold clear of all encumbrances, in the absence of anything to show that they sold for a less price on that account.

4. NOTICE TO SUE. When a claimant has been notified by the owner to sue on his lien claim within thirty days, he cannot escape the obligation arising from such notice, by thereafter filing a new lien claim for the same debt. *Sewall v. Hawkins*, 17 Vroom 161, 166.

Amendment of lien claim and order therefor by justice of supreme court.

19. At any time before judgment on a lien claim, a justice of the supreme court, on application of the lien claimant, and on reasonable notice to all parties interested, may order such lien claim to be amended, in matter of substance as well as in matter of form, whenever it shall appear to him that such amendment can be justly made; and whenever such amendment shall be ordered, the same shall be put in writing and signed by said justice, and shall be then filed in the office of the county clerk, and for his services under this section the said justice shall be entitled to a fee of (*fifty cents for the use of the state*).[1]

1901, p. 329, § 1; 1898, p. 538, § 19; Rev. 1874, § 14.

Prior to the amendment of 1901 the act had the words, "five dollars" in place of the words in parentheses; otherwise the section has remained unchanged since its first enactment in the Revision of 1874, as § 14.

1. Prior to the enactment of this section (1874) there was no means by which a lien claim could be amended, *Derrickson v. Edwards*, 5 Dutch. 468; *Vreeland v. Boyle*, 8 Vroom 346; *Vreeland v. Bramhall*, 10 Vroom 1; and, if it was defective, in any material particular, of form or substance; the whole claim failed, as a lien. *James v. Van Horn*, 10 Vroom 353; *American Brick Co. v. Drinkhouse*, 29 Vroom 432. It has recently been held, however, in *Doty v. Auditorium Co.*, 56 Atl. 720; s. c., aff. 20 Dick. 768, that a lien claim which names an insolvent corporation as owner, instead of the receiver, may be dealt with by the Court of Chancery as though it had been amended, when there is no equitable

ground for a contrary course; and in *Vreeland Co. v. Knickerbocker Co.*, 68 Atl. 215, it was held, by the Court of Errors and Appeals, in a case where the wrong person was named as owner, that the error might be corrected either by amendment, or by filing a new lien claim.

WHAT MAY BE AMENDED. The authority given by the section is to allow amendments of the *lien claim*. Authority to amend the proceedings, in the suit to enforce the lien, must be sought in § 25, post, which see. And no authority is given, either by § 25 or by this section, to amend that which is neither the lien claim, nor a proceeding, the amendment of which, will aid in determining the controversy in suit. Hence, the endorsement of the commencement of the suit, which by § 18 is directed to be made on the back of the lien claim is not an *amendable* matter. *Wheeler v. Almond*, 17 Vroom 161; *Sewall v. Hawkins*, 17 Vroom 166. See further, as to what can be done in case of omitted endorsement, § 18, supra.

WHAT DEFECTS MAY BE AMENDED. The statute says the lien claim may be amended "in matter of substance as well as in matter of form." In *James v. Van Horn*, supra, an amendment was allowed, where the claim had blended debts against several buildings, so as to apportion to each building the particular indebtedness incurred for it: in *American Brick Co. v. Drinkhouse*, 30 Vroom 462, the claim had failed to give the dates when the several items were supplied and the claimant was allowed to amend by filing a new bill of particulars giving such dates with the requisite verification. In this latter case, the Court of Errors and Appeals held, that the statute authorized an amendment which did not enlarge the claim either in, the amount of the debt, the estate to be charged, or the persons affected; but we think it clear, that the court did not intend to express the opinion that the power of amendment was limited to such amendments only as was the one there allowed. The error of naming the wrong person as owner is undoubtedly amendable, *Doty v. Auditorium Co.*, supra; *Vreeland Co. v. Knickerbocker Co.*, 68 Atl. 215.

WILFUL MISSTATEMENTS in the lien claim, will not be permitted to be amended, as, where the claimant has knowingly named, as builder, one who was the employer of the actual builder. *Bartley v. Smith*, 14 Vroom 321.

WHEN AMENDMENTS MAY BE ALLOWED. The words of the statute are clear. A defective lien claim is not a nulity, and may be amended, at any time before judgment is entered; although the application to amend is delayed until after the expiration of the time limited by § 18 for filing a claim. *American Brick Co. v. Drinkhouse*, supra.

AUTHENTICATION OF AMENDMENTS. The amended lien claim need not be sworn to: all that is required is that the amendments be put in writing and signed by the justice. *American Brick Co. v. Drinkhouse*, 29 Vroom 432.

ADVISORY OPINION. An application for amendment cannot be certified to the Supreme Court for its advisory opinion.

There is no authority for such a proceeding, either at common law or by force of §§ 247 and 296 of the Practice Act. *In re Margarum*, 26 Vroom 12; *Marcus Sayre Co. v. Moore*, 19 N. J. L. J. 110. See, however, the case of *Bartley v. Smith*, supra, in which the question, whether an amendment to the lien claim, as well as to the summons, pleading, etc., ought to be allowed, was certified to the Supreme Court, for its advisory opinion which that court gave; although, perhaps, without considering the question of its power to do so.

REVIEW OF ORDER. It is to be noticed that the order allowing an emendment of the lien claim (other than an order altering the description of the curtilage) is not one which can be made in the suit, and that, therefore, it is only open to collateral attack in that suit, that is, to attack for that the justice was without jurisdiction to make it. If it is desired, on other grounds, to review the decision allowing such order, that can only be done by proper proceedings, presumably by certiorari, directly taken for that purpose. *American Brick Co. v. Drinkhouse*, 30 Vroom 462.

Amendment of description of curtilage by justice of Supreme Court, and rule therefor.

20. At any time before the entry of final judgment in a suit under this act, it shall be lawful for a justice of the supreme court, upon the application of either the owner, builder or lien claimant, and upon reasonable notice to the others to alter the description of the curtilage as set forth in the lien claim, and, in the form of a rule of court, in the suit, to determine the true size and description of the curtilage; and in all subsequent proceedings in such suit, or in relation thereto, the curtilage so determined shall be treated as if the same had been described in the original lien claims, and such justice, for his services under this section, shall be entitled to a fee of two dollars, which shall be paid by the applicant, and may be taxed with the costs in such suit; (*provided, that the amendments, authorized in this and in the next preceding section, shall not affect the rights of any bona fide purchaser or mortgagee, acquired between the time of filing the original lien claim and that of filing said amendments*).[1]

1898, p. 538, § 20; 1868, p. 369, § 2; Rev. 1874, § 15.

The words in parentheses were added by the Revision of 1874; otherwise the section has remained the same as first enacted in 1868.

1. As to what *is* the proper curtilage, see the next section (21).

A DEFECTIVE DESCRIPTION, which includes too much land, does not render the lien claim bad. In such a case, prior to the enactment of this section, the proper curtilage could have been settled at the trial, as one of the facts in issue; and, if a less curtilage, than the one described, was found to be proper, judgment was to be given accordingly. *Edwards v. Derrickson,* 4 Dutch. 39; s. c., 5 Dutch. 468. Such is presumably, still the rule, when no application to alter the description of the curtilage is made; and, if it be found that the plaintiff is entitled to a special judgment against the lands described in the claim; such finding cannot be attacked, on error, unless it affirmatively appears that it was erroneous in point of law, *James v. Van Horn,* 10 Vroom 353. As to the possibility of attacking a judgment, in a collateral proceeding, on the ground that the curtilage is excessive, or erroneous, see post, under § 24.

EFFECT OF ORDER, ALTERING DESCRIPTION OF CURTILAGE. If, on application, under this section, an order is made altering the description of the curtilage; the extent of the curtilage, so far as it could be in issue on the trial, is thereby determined (and the same may be true if the justice, on application and hearing, refuses to alter the description, see *Gerard v. Birch,* 1 Stew. 317); and such determination (being, by the express words of the statute, "a rule of court in the suit," and so reviewable on writ of error) can be reviewed only when it was erroneous, in point of law. *American Brick Co. v. Drinkhouse,* 30 Vroom 462. As to the possibility of attacking a judgment, in a collateral proceeding, on the ground that the curtilage is excessive, or erroneous, see post, under § 24.

OMISSION OF DESCRIPTION OF CURTILAGE. It is questionable whether this section covers the case of a lien claim which entirely omits to describe any curtilage. It seems to contemplate the case of a mistaken description, not that of an omitted one, see *American Brick Co. v. Drinkhouse,* 29 Vroom 432. The quaere is, is a lien claim amendable if it omits to describe any curtilage, and, if it be amendable, is it amendable under § 19 or under this section? The alteration of the description of the curtilage is to be a rule of court in the suit; the order allowing an amendment is not such a rule.

Extent of curtilage defined, when not otherwise fixed by enclosure, usual building lot and map, etc.

21. When the curtilage or lot on which the building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner, then the lot on which the building lien shall extend, shall be such tract as in the place of its location is usually known and designated as a building lot, and bounded by the lines laid down for its boundaries on any map made for the sale of it or on

file in any public office, to lay out in lots the tract including it, and in cases where no such map exists, such lot may be designated by the claimant in the lien claim, but in no case shall the same exceed half an acre, or include any building not used and occupied with, or intended to be used and occupied with, the building for the cost of which the lien is claimed.[1]

1898, p. 538, § 21; 1863, p. 275, § 3; Rev. 1874, § 16.
See also, *1868, p. 369, § 1.*

This section is the same as it was first enacted in 1863 and has so stood ever since.

1. WHAT IS THE PROPER CURTILAGE. Prior to the enactment of this section it was decided that the curtilage, intended by the act to be subject to the lien, was so much land as might be necessary for the convenient and beneficial enjoyment of the building, on which the work was done; and that, therefore, its proper extent, in each case, would be a question of fact, which must be taken to have been correctly settled, on the trial, unless it appeared on the record that an error in law in that behalf had been made. *Derrickson v. Edwards,* 5 Dutch. 468; and see also, *Van Dyne v. Van Ness,* 1 Halst. Ch. 485; and also, note to § 20, supra, as to settlement of curtilage on an application to alter the description thereof.

The enactment of this section limited the curtilage to the usual building lot, when there is a map; and to half an acre, when there is not; but this limitation applies only in a case falling within the scope of the act. In *Gerard v. Birch,* 1 Stew. 317, it was said (per Runyon Ch.) that the limitation of the curtilage to half an acre applies only when there has been no description of the curtilage by the owner, and when the means of designation by map do not exist.

In *Federal Trust Co. v. Guigues,* 74 Atl. 652, it is said (by V. C. Howell) that, when § 21 does not apply, the Court of Chancery, in a foreclosure case, will determine the proper curtilage by confining it to so much of the land as is necessary to the convenient and beneficial enjoyment of the building on which the claimant's work or materials were bestowed.

The scope of the act is limited to the case where the owner has not surrounded the lot built upon with an enclosure separating it from his adjoining lands, *James v. Van Horn,* 10 Vroom 353; *Gerard v. Birch,* 1 Stew. 317; and so, if the owner has enclosed a large tract with a fence, but has other adjoining lands, the whole of such large tract may be subjected to a lien for a building erected on it.

Therefore, in *James v. Van Horn,* 10 Vroom 353, in which the judgment established a lien on the whole of a tract of 50 acres, which was surrounded by a fence, as it did not appear, on the re-

cord, whether the owner had adjoining lands or not; it was held, that the propriety of the judgment could not be questioned, on writ of error; because the facts, necessary to show that the case was one which fell within the scope of the act (in that case, that owner had no ajoining lands), must have been found, or indisputably have appeared, in order to make it apparent, on the record, that an error in law had been committed in giving the judgment, and the record showed no such finding or facts.

Apportionment of claim among several buildings. Lien claim in such case to contain what. Suits in such case how to be brought. Release of one building, not to impair lien against others.

22. Whenever any person or persons shall hereafter furnish any material or perform any labor, for the erection and construction of two or more buildings, where such buildings are built and constructed by the same person or persons, it shall be lawful for the person or persons so furnishing such materials or performing such labor to divide and apportion the same among the said buildings, in proportion to the value of the materials furnished to and the labor performed for each of said buildings, and to file with his, her or their lien claim therefor a statement of the amount so apportioned to each building, in lieu of the bill of particulars required by the sixteenth section of this act, which said lien claim when so filed may be enforced under the provisions of this act in the same manner as if said materials had been furnished and labor performed for each of said buildings separately; and if the person or persons who shall have furnished such materials or performed such labor shall have released his or their lien claim against any one or more of such buildings, or if any one or more of such buildings shall have been built and constructed under a contract in writing duly filed, pursuant to this act, such release or such filing of a contract shall not affect or impair the lien or claim of such person or persons against the building or buildings not so released, or not so built and constructed by contract, nor the lots or curtilages whereon the same are erected.[1]

1898, p. 538, § 22; 1873, p. 71; Rev. 1874, § 17.

This section has remained unchanged since its first enactment in 1873.

1. It was held in *Johnson v. Algor,* 36 Vroom 363, that the statute does not contemplate that there shall be a separate and distinct lien claim filed for each one of the buildings; there should be one lien claim filed, containing a statement of the apportionment of the debt among the several buildings according to the statute. But when proceedings are begun to enforce a lien, in a case where an apportionment is necessary, there must be a separate summons declaration, etc., and judgment and execution against each building and its curtilage.

But in *Culver v. Lieberman,* 40 Vroom 341, it was held, by the Court of Errors and Appeals, that when a single debt exists for the erection of several buildings, the lien therefor is to be enforced by a single lien claim, a single suit and a single declaration in which the debt is to be apportioned among the several buildings and curtilages according to the respective liability of each; and *Johnson v. Algor,* so far as it held otherwise, was overruled. In delivering the opinion in *Culver v. Lieberman,* Justice Fort reads the words of the section: "Where such buildings are built and constructed by the same person or persons," as referring only to the contractor, and not to the owner, or owners; and holds that a careful reading of §§ 16, 22 and 24 shows that the statutory intent is to give a single suit against the builder, upon a single indebtedness, and to bring into that suit, by the lien claim, summons and declaration, the builder and all persons who, as owners or mortgagees, have any interest in the property against which a special judgment is sought. To that end, it seems, that, in a proper case, the plaintiff may in one suit join, as defendants, different owners of several tracts. The lien claim, as well as the declaration must, of course, apportion the claim and describe the several buildings and curtilages.

If the lien claim fails to make the necessary apportionment, and to designate specifically the amount claimed on each building, it will constitute no encumbrance on the premises. *Morris County Bank v. Rockaway, etc., Co.,* 1 C. E. Gr. 150; but such a defect may be amended, at any time before judgment. *James v. Van Horn,* 10 Vroom 353; and see § 19, supra; but, if not amended, the judgment would be subject to collateral attack. *Morris County Bank v. Rockaway, etc., Co.,* supra.

It was questioned, in the case last cited, whether such a lien claim would be valid, in case all the buildings are on the same tract; but, as all the buildings were, in fact, on different tracts, no opinion was expressed on the question adverted to, although it was intimated by the Chancellor (Green) that such a claim would be bad, unless the buildings upon the same tract, were within the same curtilage and mere appurtenances of a main building. This seems to have been otherwise considered in *Johnson v. Algor,* above cited.

Where several buildings (such as a row of apartments or tenements) are erected for a single owner upon what is really a single plot of land, it may be questionable whether there is any need of an apportionment at all. As this is a question likely to

be presented frequently in practice, the writer ventures the advice that the only safe course is to make such apportionment whenever it is possible to do so; since each such tenement is capable of being separately conveyed or encumbered; and, therefore, the owner is entitled to have the claim apportioned so as to preserve to him the valuable right, freely to deal with his property as severable parcels, if he chooses. It may not be entirely correct, but it may be practically so, to say that the possibility of allotting a definite curtilage to each tenement will determine the necessity of making an apportionment. By this test, a four-story building with an apartment on each floor is indivisable, but a row of tenements is not. A building may be divided by a vertical, but not by a horizontal, plane, for the purpose of such apportionment.

Suit on lien claim may be in the Circuit or District Court. Parties. Form of summons. Service of summons. Substituted service of summons, and affidavit in such case.

23. When a claim is filed agreeably to the provisions of this act, upon any lien created thereby, the same may be enforced by suit, in the circuit court of the county where such building is situated,[1] which suit shall be commenced by summons against the builder and the owner of the land and building[2] * *and every person holding a mortgage of record against the property affected by said claim whose mortgage would be cut off by a sale under said claim.*[3] * in the following or like form:

Summon A. B. builder, and C. D. owner (or if the owner contracted the debt, A. B. builder and owner), * *and E. F. mortgagee (if there be a mortgage or mortgages)* * to appear before the Circuit Court in and for the County of , at , in the said County, on the day of , That the said A. B. (the builder) may answer unto G. H. (the claimant) of a plea (as in an action upon contract) for which the said G. H. claims a building lien on certain buildings and lands of said C. D. (describing the building and lands as in the claim on file): **and upon which said E. F. holds a mortgage of record.* *

And the said summons shall be directed, tested, and made returnable,[4] and may be served and returned in the same manner as other writs of summons; and such summons may be served upon the defendants, or either of them, in any county of this state, by the sheriff thereof, and for this purpose the same or a duplicate thereof, may be issued to such

sheriff; and if any defendant cannot be found in this state, it may be served upon him by affixing a copy thereof upon such building, and also by serving a copy on such defendant personally, or by leaving it at his residence ten days before its return, which shall be deemed actual service, or in case such defendant resides out of this state, by affixing a copy on such building and sending a copy by mail, directed to him at the post office nearest his residence, or in case his residence is not known to the plaintiff, then by affixing a copy to such building, and by inserting it for four weeks, once in each week, in some newspaper of this state, published or circulating in the county where such building is situate, either of which shall be legal service; and when an affidavit shall be made and filed of the facts authorizing and constituting any such service, not made by a sheriff or officer, the suit may proceed against the party so served as if such summons had been returned served by the sheriff.[5]

1898, p. 538, § 23; 1853, p. 437, § 8; Rev. 1874, § 18; 1884, p. 260, § 1.

The words between the asterisks are inserted in the Revision of 1898, because of the provisions of the act of 1884, which was the first enactment which made it necessary or proper to make mortgagees of record parties to lien claim suits; otherwise the section has remained the same as enacted in 1853.

By the act of 1910, p. 229, approved April 8th, the foregoing section was amended to read as follows:

When a claim is filed agreeably to the provisions of this act upon any lien created thereby, the same may be enforced by suit in the Circuit Court of the county where such building is situated, or in any District Court of the county (providing the claim does not exceed five hundred dollars) where such building is situated, and when the suit is brought in a District Court the practice shall be as nearly as possible the same as now provided, or may hereafter be provided by law in District Courts in action on contracts, which suit shall be commenced by summons against the builder and the owner of the land and building, and every person holding a mortgage of record against the property affected by said claim, whose mortgage would be cut off by a sale under said claim, in the following or like form:

Summon A. D., builder, and C. D., owner (or if the owner

contracted the debt, A. B., builder and owner) and E. F., mortgagee (if there be a mortgage or mortgages), to appear before the Circuit Court (or District Court of the city of ——, or of the district ——, as the case may be), in and for the county of ——, at ——, in the said county, on the —— day of ——, that the said A. B.) (the builder) may answer unto G. H. (the claimant) of a plea (as in an action upon contract) for which G. H. claims a building lien on certain buildings and land of said C. D. (describing the building and lands as in the claim on file), and upon which said E. F. holds a mortgage of record.

And the said summons shall be directed, tested and made returnable, and may be served and returned in the same manner as other writs of summons in the court from which issued, and such summons may be served upon the defendant, or either of them, in any county of this State by the sheriff thereof, if brought in the Circuit Court, or by a constable or sergeant-at-arms, if the suit is brought in any District Court of any county; and for this purpose the same, or a duplicate thereof, may be issued to such sheriff, or constable, or sergeant-at-arms, as the case may be, and if the defendant cannot be found in this State, it may be served upon him by affixing a copy thereof upon such buildings, and also by serving a copy on such defendant personally, or by leaving at his residence ten days before its return, which shall be deemed actual service, or in case such defendant resides out of this State, by affixing a copy on such building and sending a copy by mail, directed to him at the post office nearest his residence, or in case his residence is not known to the plaintiff, then by affixing a copy to such building and by inserting it for four (4) weeks, once in each week, in some newspaper of this State published or circulating in the county where such building is situated, either of which shall be legal service; and when an affidavit shall be made and filed of the facts authorizing and constituting any such service not made by a sheriff or officer, the suit may proceed against the party so served as if such summons had been returned served by the sheriff or other officer.

By the further act of 1910, p. 225, approved April 18th, it was enacted as follows:

A supplement to an act entitled "An act to secure to mechanics

and others payment for their labor and materials in erecting any building" (Revision of 1898).

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Any final judgment of any District Court under the provision of the act to which this is a supplement shall be docketed in the Circuit Court of that county by the party recovering the same or by his executors, administrators or assigns in the manner hereinafter directed.

2. The clerk of every Circuit Court shall provide and keep a docket, in which shall be entered, upon complying with the provisions of this act, all such final judgments from any District Court.

3. When a judgment is obtained in any District Court under the provisions of the act to which this act is a supplement, including costs, the clerk of such Circuit Court of the county, upon filing in his office a statement signed by the clerk of the District Court, under the seal of the court, which statement shall contain the name of the court, the name of the parties, and whether judgment be general against the builder or against the building and land only, or both, the amount and date of judgment, and also an oath or affirmation of the party, his or their attorney or agent, that at the time of filing such statement a certain amount is still due thereon, stating the amount, shall enter in a docket provided for that purpose a transcript of such judgment in words at length containing the name of the District Court in which the judgment was obtained, the names at length of the parties to said judgment, the style of the action, the date of the judgment, the amount recovered with costs, the substance of the return of the constables or sergeant-at-arms, and the amount stated to be due in the affidavit. The fees of the clerk of the Circuit Court for filing such statement shall be two dollars, and to the clerk of the District Court for certifying the same, fifty cents.

4. Such judgment shall, from the time of such docketing in the Circuit Court, operate as a judgment obtained in a suit originally commenced in said court, and satisfaction thereof may be entered in the same manner and upon the same evidence as is now provided by law in case of judgments rendered in the Circuit Court under this act, and execution may issue thereon out of the Circuit Court which shall be of the same effect as to the property of the judgment debtor, either personal or real, as as if issued on a judgment originally obtained in such Circuit Court upon a suit commenced therein.

5. After any final judgment of any District Court under the provisions of the act to which this act is a supplement, no execution shall issue thereon out of any District Court, nor shall any proceedings be had thereon except the due and proper granting of a new trial, an appeal or certiorari, no judgment shall be allowed to be docketed after the granting of a new trial, an appeal or certiorari and pending the determination thereof.

6. Every judgment docketed as herein directed may be revived

by scire facias in the Circuit Court in the same manner, in like cases and with the like effect as if said judgment had been obtained in a suit commenced in that court.

7. The clerk of the Circuit Court shall make a complete alphabetical index to the docket in which said judgments are to be entered, and said docket shall be a public record, to which all persons desiring to examine the same shall have access.

8. If any judgment recovered in any District Court shall be removed by appeal or certiorari, and the necessary bond be perfected, and such judgment shall, either before or after such removal, be docketed as herein provided, execution from the Circuit Court in which said judgment is docketed shall be stayed and suspended until the final determination of such appeal or certiorari.

9. If any judgment, docketed as hereinbefore provided, shall be reviewed upon certiorari or appeal, and a duly certified transcript of the judgment of the court wherein such appeal or certiorari may have been determined shall be delivered to the clerk of the Circuit Court of the county where such judgment is docketed, it shall be the duty of the said clerk to file the same in his office, and enter in the margin of the docket opposite the entry of said judgment, in short form, the substance of such determination upon the appeal or certiorari.

10. All acts and parts of acts inconsistent herewith are hereby repealed, and this act shall take effect immediately.

The following notes were prepared before these new enactments were adopted:

1. THE CLAIMANT'S DEBT MUST BE DUE, before his suit is begun. See § 1, note 3; § 16, note 1.

In a suit to enforce a lien claim, as in any other, the plaintiff's right of action must be complete before he begins. *Titus v. Gunn,* 40 Vroom 410. See the notes to form of Building Agreement, post, as to when such right is complete.

"There is nothing occult or mysterious about an action upon a mechanic's lien claim, so far as the builder is concerned, it is an ordinary action *in personam.* Combined with it, however, is an action, *quasi* in rem, to establish and enforce a lien upon certain defined interests in the building and land in question." *Vreeland Co. v. Knickerbocker Co.,* 68 Atl. 215.

As to the necessity of prosecuting suit with DILIGENCE, see § 18 and notes.

JURISDICTION of the Circuit Court, is exclusive in mechanic's lien cases, and the act of 1892, p. 224, authorizing the transfer of causes from the Circuit Court to the Common Pleas and the trial thereof by the latter as if the same had originally been brought in the latter court, gives the Common Pleas no jurisdiction in a lien case. *Coles v. First Baptist Church,* 30 Vroom 311.

2. WHO IS OWNER. The person made defendant, as owner, must have a legal estate in the lands, either in fee, for life, or

a term for years, *Ayers v. Revere,* 1 Dutch. 474; *Coddington v. Beebe,* 2 Vroom 477; *Corcoran v. Jones,* 12 N. J. L. J. 38; *Tomkins v. Horton,* 10 C. E. Gr. 284; and the lands cannot be made to answer unless the owner of such an estate in them is made a defendant as owner. *Macintosh v. Thurston,* 10 C. E. Gr. 242; and see cases last cited. See also under § 1, note 5; § 16, note 4.

CHANGE OF TITLE. The owner at the time the lien claim is filed is the proper person to be made party defendant as owner, even although the property has been conveyed to him since the work was begun. *Edwards v. Derrickson,* 4 Dutch. 39; 5 Dutch. 468; *Robins v. Bunn,* 5 Vroom 322; *Slingerland v. Lindsley,* 1 N. J. L. J. 115; *Erdman v. Moore,* 29 Vroom 445; *Tompkins v. Horton,* 10 C. E. Gr. 284; and the after proceedings must be continued in the same name notwithstanding any change in the title after the lien claim is filed. Purchasers, after the lien claim is filed, are purchasers pendente lite, and take title subject to the issue of the pending suit. If a party acquiring a right after lien filed, desires to contest the lien, he must apply for leave to defend by appropriate plea in the name of the owner when the lien was filed. *Edwards v. Derrickson,* 4 Dutch. 39; *Ennis v. Eden, etc., Co.,* 48 Atl. R. 610.

A conveyance of the land by the owner to another as collateral security, for the payment of a debt does not constitute a change in the ownership of the lands. *Gordon v. Torrey,* 2 McCarter, 112.

A VARIANCE as to the name of the parties, as between the lien claim and the summons was formerly a serious matter, *Cornell v. Matthews,* 3 Dutch. 522; *Vreeland v. Boyle,* 8 Vroom 346; and in spite of the power of amendment given in §§ 19 and 25, it may be so yet. See § 16, note 8; § 19, note 1; and § 25.

EQUITABLE ESTATES, as to these, see § 1, note 5.

TERMS FOR YEARS, see *Corcoran v. Jones,* 12 N. J. L. J. 38; and supra, § 16, note 4; § 7, and notes.

ESTATE BY ENTIRETY. If the attack is against only the estate of the husband, the lien claim should name both as owners, but the suit should be against the husband only, as owner. *Washburn v. Burns,* 5 Vroom 18. On a suit now, to enforce a lien for a building erected on lands held by such a title, where the husband contracts for the erection in his own name only, the entire fee is, perhaps, liable to the lien. See § 2, note 1, and § 13, note; if the contract is made by the woman only, only her estate would be liable. See § 7.

In an APPORTIONMENT case there must be but one suit. *Culver v. Lieberman,* 40 Vroom 341. See §§ 22 and 16, and notes to § 22.

3. MORTGAGE DEFENDANTS. Prior to the enactment of the provision for making a mortgagee a party defendant, by the act of 1884, a mortgagee could not be made a party to the proceedings, *Tompkins v. Horton,* 10 C. E. Gr. 284; *Central Trust Co. v. Bartlett,* 28 Vroom 206; and only mortgagees, whose mortgages have been recorded since the lien attached (the commencement of the building), can be made parties to the suit under that act.

Central Trust Co. v. Bartlett, supra. The effect of omitting to make such mortgagees defendants is, of course, that the ensuing judgment will not be conclusive as to them. *Cox v. Flanagan,* 2 Atl. 33.

As to when the lien attaches, see §§ 14, 15 and 28.

A person who has a deed absolute on its face, but intended as a mortgage is, in equity, a mortgagee, *Gordon v. Torrey,* 2 McCart. 112; and if the facts are known to the claimant, should, perhaps, be made a party in the lien suit, as such.

Mortgagees who acquire their interests after the lien claim is filed, and before suit is begun, ought also, perhaps, to be made parties. It may be that they would be cut off, as purchasers pendente lite, without being so brought in, *Ennis v. Eden, etc., Co.,* 47 Atl. R. 610; but the words of the statute are broad enough to include them, and *Ennis v. Eden, etc.,* Co., in its circumstances, covered only the case of purchasers, not mortgagees.

4. The summons need not actually be sealed and attested by the clerk, the attorney may do both these things, *James v. Van Horn,* 10 Vroom 353; but the attorney must see that the time of issuing the summons is endorsed by the clerk upon the lien claim within four months from the issuance thereof, or, in case there has been a notice to sue given by the owner to the claimant, then within thirty days after receipt of such notice. See § 18, note 2; and also *Currier v. Cummings,* 13 Stew. 145.

5. SERVICE OF PROCESS. The statute contemplates three modes of service: (a) ordinary due service upon the defendant in person, or at his place of abode within the State; (b) actual service outside of the State either upon the defendant in person or at his place of abode; (c) constructive, or legal, service outside of the State by mailing and publication. In the last two modes, a copy of the summons is to be affixed also to the building. Since the fourteenth amendment of the Constitution of the United States, as construed in *Pennoyer v. Neff,* 95 U. S. 714, no valid judgment in personam can be entered against a defendant served only in the second and third modes; although, before that amendment, such judgment would have been held good within the State, as the legislature, on the passage of the original of this section in 1853, intended should be the case.

But such judgment in personam may be entered, and will be valid, against a defendant builder, who, although not served duly within the State, voluntarily appears and, by pleading the general issue, submits himself to the jurisdiction of the court, in the suit to enforce a lien claim. *Smith v. Colloty,* 40 Vroom 365 (E. & A.); *Culver v. Lieberman,* 40 Vroom 341.

DEFECTIVE SERVICE, may be cured by taking an order for a new summons and making a good service thereof. *Mutual Benefit, etc., Co. v. Rowand,* 11 C. E. Gr. 389. In the case last cited, it was held, that such a new summons would be valid and effectual to preserve the lien, even if issued later than the statutory period for beginning suit (then one year, now four months, after

the last item of the claim); and it could, probably, be taken now at any time before the plaintiff would be precluded for laches in prosecuting his suit. See § 18, note 3. See also under § 24, note 6.

FORM OF RETURN. If the summons bears the return, that it was duly served on the defendants, builder and owner, but the manner of service does not appear, it is a good return, as against the owner (and undoubtedly as against mortgagees also); since the builder is the only party defendant who can be affected by the manner of service. *James v. Van Horn*, 10 Vroom 353.

If the return of SERVICE ON A CORPORATION, defendant as both builder and owner, show that it was served on the secretary without showing that the president, or other head officer, could not be found; it is not a good return; but, after judgment by default, and motion to open default denied, it cannot be objected to for the first time, on writ of error; for it is to be presumed that the defect might have been cured by proof, if the objection had been made at the Circuit. *Ennis v. Eden, etc., Co.*, 48 Atl. R. 610.

Declaration. Form; recitals; averment that debt is a lien, etc.; schedules. Practice, pleadings; defenses. Effect of special plea that building and lands are not liable. Priorities; verdict; judgment—general or special or both. Effect of special judgment. Surplus proceeds on sale on execution.

24. The declaration in such case shall, after reciting that the owner and builder (*and other defendants*) were summoned, and how served, (*and why such other defendants were made defendants*),[1] be against the builder, and in the same form as in other actions upon contract, and shall conclude with an averment that said debt is, by virtue of the provisions of this act, a lien upon such building and lot, describing the same as in said claim;[2] and to said declaration a schedule may be annexed, and the practice, proceedings and pleadings thereon shall be conducted, and the judgment entered, as in suits in said circuit court to recover money due on contract;[3] and all or any of said defendants may, jointly or severally, have any defence or plea to the same that might be had by the builder to any action on said contract without this act; and in addition thereto, the owner (*or mortgagee*) may plead that said building or land are not liable to said debt,[4] and in such case it shall be necessary for the plaintiff, to entitle him to judgment against the building and lands, to prove that the provisions of this act, requi-

site to constitute such lien, have been complied with: (*and any defendant mortgagee may have a further plea that said lien claim is subject to such mortgagee's lien, and the judgment in any such case shall determine the priority of the liens of the plaintiff and each of said defendants, and any judgment or proceeding under the same shall not affect the lien of any of said defendants whose lien shall be determined to be paramount to that of the plaintiff*);[5] and in case a verdict be rendered or judgment be given against the builder only, judgment shall be given for the landowner, with costs against the plaintiff; and in case judgment be given for the plaintiff, it shall be entered against the builder when he was actually served with the summons, generally, and with costs as in other cases; and when only legal service of the summons has been made, judgment against the owner and also against the builder, shall be specially for the debt and costs, to be made of the building and lands in the declaration described; and in case no general judgment is given against the builder, such proceedings or recovery shall be no bar to any suit for the debt, except for the part thereof actually made under such recovery;[6] (*and if the proceeds of the sale of the buildings or lands under any such judgment shall be more than sufficient to pay the judgment of said plaintiff, and any concurrent mechanics' lien claims entitled to payment out of the proceeds of said sale under the provisions of this act, any surplus shall be distributed by the court out of which the execution issued to the said defendants holding liens, subject to that of the plaintiff, according to the priority of their respective liens as determined in said judgment*).

1898, p. § 24; 1853, p. 437, § 9; Rev. 1874, § 19; 1884, p. 260, § 2.

The words in parentheses were inserted, because of the act of 1884, in the Revision of 1898. The act of 1884 had not formally changed the reading of the section, as enacted in 1853, to that of the present draft; but its effect was precisely the same as if it had. The original reading of the section, as enacted in 1853, with some slight, and merely verbal changes made in the Revision of 1874, may be seen by reading it, as it now stands, without the words in parentheses.

1. VARIANCE. There must not be a variance between the claimants named in the lien claim and those named as plaintiffs in the suit. *Vreeland v. Boyle,* 8 Vroom 346.

RECITAL OF SERVICE. The manner of service of the summons is material only in determining whether there can be a general judgment, or not, against the builder. The owner, therefore, cannot, after plea, object on such ground. If he wishes to do so, he must demur. *James v. Van Horn,* 10 Vroom 353.

In a suit against a corporation, as builder and owner, ending in a judgment, general as well as special; it cannot be objected for the first time on error, that the declaration did not show how the defendant was served. *Ennis v. Eden,* 48 Atl. R. 610. So if the declaration recite that the defendant builder was actually served with process, and no evidence to the contrary is offered, the fact, that the defendant builder *is* shown to be a resident of another State, does not entitle him to object to the entry of a general judgment against him. *Culver v. Lieberman,* 40 Vroom 341.

2. OWNER'S ESTATE. The declaration need not state what the owner's estate in the land is, it is only necessary to name the owner as such, and to aver that the debt is a lien on the building and lot described in the declaration as in the lien claim, *Cornell v. Matthews,* 3 Dutch. 522; but if it affirmatively appears, on the face of the declaration and lien claim, that the person, sued as owner, has no estate at all in the lands, the suit cannot be maintained, *Babbitt v. Condon,* 3 Dutch. 154.

PRODUCTION OF SUIT. The declaration need not conclude, "and therefore he brings his suit;" the averment, that the claim is a lien upon the building and lot, etc., is the conclusion of the declaration. *Cornell v. Matthews,* 3 Dutch. 522.

USE OF MATERIALS. It is not necessary that the declaration should aver that the materials for which the debt was incurred were actually used in the building, inasmuch as it is only necessary to prove that they were ordered and furnished for that purpose. *Morris Co. Bank v. Rockaway, etc., Co.,* 1 McCart. 189; *Campbell v. Taylor, etc., Co.,* 51 Atl. R. 723.

APPORTIONMENT OF LIEN. See, as to the proper method of framing the declaration, in case the claim is to be apportioned between several buildings, *Culver v. Lieberman,* 40 Vroom 341. See also, under § 22, note 1. The declaration, as well as the lien claim, must apportion the claim and describe the several buildings and curtilages.

CONDITIONS PRECEDENT. The plaintiff will find it wise to aver the performance of all conditions precedent. See *Stewart Contracting Co. v. Trenton Co.,* 42 Vroom 568; *Dimick v. Metropolitan Ins. Co.,* 38 Vroom 367.

3. FILING DECLARATION. In *Craig v. Smith,* 3 N. J. L. J. 380, (Oct. 15, 1880) it was held, at Circuit, that if the declaration in a lien suit be lodged with the clerk to be filed, and is by the latter marked as filed, prior to the return day of the summons, it is an irregularity which will render viodable, a judgment by default, entered more than sixty days after such return day. This ruling was made on the asserted authority of *Brown v. Daws.* 3 Zab. 483; but that case, when examined, does not seem to sup-

port it; for the most that it decided was, that, under the practice as then (1852) established by law, a defendant's time to plead could not be shortened by a notice that the plaintiff had filed his declaration, when such notice was served before the plaintiff legally *could* have filed his declaration. See the act of 1852, p. 218, § 1; and see also, 3 N. J. L. J. 355, editorial comment on *Craig v. Smith*.

By the act of 1884, p. 267, now Gen. Sts., p. 2587, § 320, a plaintiff is authorized to file his declaration at any time after the issue of the summons, and to then serve it on the defendant, or to annex it to, and have it served with, the summons, before it is filed; but there is some doubt whether this statute applies to the case of a suit to enforce a lien, since it is required that the declaration in such a suit shall recite that the defendants have been summoned and how they have been served, and it would seem that this could only be done after the return day of the summons had been reached. See suggestion of Justice Depue, 13 N. J. L. J. 30.

SERVICE OF DECLARATION. There seems to be, therefore, a doubt that the declaration in a lien suit can be served before the return day of the summons; But no reason appears for supposing that it may not be served after that time, as declarations in other suits may be.

SCHEDULE. In a case where neither the lien claim nor declaration showed that the debt was incurred for work done by contract, but, on the contrary, showed a number of apparently separate items with the date and amount of each, it was held, in a collateral foreclosure suit, that it could not be shown by extrinsic evidence that the debt, in fact, was for contract work, and that, therefore, under the law as it then stood (1875), the judgment, as a special lien, was good only to the extent of the items which, on the face of the record, appeared to have been furnished within the year before the lien claim was filed. *Raymond v. Post*, 10 C. E. Gr. 447.

LIEN CLAIM AS EVIDENCE. It is not error to allow the lien claim to go to the jury when it is shown to a witness who testifies that the bill of particulars therein contained is a correct statement of the goods which he, the witness, ordered for the building. *Mooney v. Peck*, 20 Vroom 232.

REFERENCE. The language of the section makes § 155 of the Practice Act applicable to lien suits. There must be matters of account, however, in controversy, to justify a reference. *New York Co. v. Kiernan*, 44 Vroom 763 (E. & A.).

See also the act of 1905, p. 374, §§ 1 and 2, printed below as §§ 24a and 24b.

4. PLEA IN ABATEMENT. One who is sued as owner, but who, in fact, is not, has the right to raise the question by plea in abatement. *Faith v. McNair*, 13 N. J. L. J. 44; see also *Tomlinson v. DeGraw*, 2 Dutch. 73.

DEMURRER. If it appear on the face of the declaration and lien claim that the debt is not a lien on the property therein described, the owner may demur. *Coddington v. Beebe*, 5 Dutch.

550; *Coddington v. Hudson, etc., Co.,* 2 Vroom 477; and see note 2, supra.

PLEAS IN BAR. The builder can plead only such pleas as he might in an action against him on contract. *Tomlinson v. DeGraw,* 2 Dutch. 73.

SET OFF. The builder cannot set off claims, due to him from the plaintiff, which have accrued to him in transactions other than that on which his lien claim is based. *Naylor v. Smith,* 34 Vroom 596. See, however, the very able dissenting opinion in this case, reported in 35 Vroom 358, delivered by Justice Collins, and concurred in by Justices Lippincott and Dixon. It seems unfortunate that the views there expressed were not adopted by the majority of the Court of Errors and Appeals.

NON-PERFORMANCE OF CONDITIONS PRECEDENT. If the plaintiff has averred generally, as he may do, the performance of such conditions, the defendant must take care to plead the non-performance of any such condition specially; if he means to rely thereupon, as, for example, the condition requiring the production of an architect's certificate. If the defendant fails so to plead, he will be precluded from such defense. *Stewart Co. v. Trenton Co.,* 42 Vroom 568; *Ottowa Tribe v. Munter,* 31 Vroom 459.

PLEA THAT THE LAND IS NOT LIABLE. This plea does not raise the issue of the title to the property, nor compel the plaintiff to prove the ownership, or estate, of the defendant therein. That question may be raised by a plea in abatement, as just noticed; but under this plea it is immaterial what interest the defendant has, or whether he had any. *Cornell v. Matthews,* 3 Dutch. 522; *Washburn v. Burns,* 5 Vroom 18. If the owner wishes to contest the validity of the lien he must do so by this plea, and the only issue raised by it is, the validity of the lien, as against the land, on the assumption that he is the owner of it. *Tomlinson v. DeGraw,* 2 Dutch. 73; and see the cases also just cited. The plea imposes upon the claimant the burden of establishing, as against the owner or mortgagee, that the provisions of the act, requisite to constitute the lien, have been complied with. *Vreeland Co. v. Knickerbocker Co.,* 68 Atl. 215. Prior to the act of 1884, no one but the owner could plead this plea, as he was the only one concerned in contesting the validity of the lien. *Tomlinson v. DeGraw,* supra; *Cornell v. Matthews,* supra; but now mortgagees also may plead it. An owner who is summoned only as builder, but declared against as owner, waives the irregularity of the summons, by pleading this plea. *Cornell v. Matthews,* supra.

PLEA THAT MATERIALS WERE NOT USED. There can be no such plea. If it were competent to show this in defense it would be permissible only under the plea just above mentioned, but it is no defense, even if true, unless, perhaps, in case of fraud. *Bell v. Mecum,* 68 Atl. 149. See note 2, supra, Use of Materials.

VARIANCE. If the lien claim is for repairs and the proof is the erection of a new building, there is a fatal variance. *Cox v. Flanagan,* 2 Atl. 33 (Bird, V. C.).

OTHER DEFENSES. When the builder is also vice president of a corporation that is supplying him with materials, the owner who settles with him, without assuming to discharge such builder's debt to said company, and with neither his nor its consent for such a transaction, cannot afterwards claim that the company's right of lien has been thereby discharged. *Kaighn v. Friday,* 73 Atl. 540.

A stipulation that there shall be no defense but payment will preclude any other defenses. *Kaighn v. Friday,* supra.

The owner cannot plead that the plaintiff has previously made an unsuccessful attempt to establish the same claim against the supposed interest of another person in the same land. If true, that would be no bar; and the act gives the owner the right to plead only that the lands are not liable and such other pleas as the builder can plead. *Vreeland Co. v. Knickerbocker Co.,* 68 Atl. 215.

INTERLOCUTORY ORDERS, made in the course of a lien suit are not reviewable by certiorari. The proceedings in such suit are according to the course of the common law, and are reviewable only by writ of error after final judgment. *Five Mile Beach Co. v. Friday.* 66 Atl. 901.

5. CONCLUSIVENESS OF JUDGMENT. A judgment on a lien claim has the same quality of conclusiveness that an ordinary common law judgment has, when put in issue in a collateral proceeding. It may be avoided for fraud but cannot be set aside for imperfections in the lien claim or irregularities in the prosecution of the suit. *Jacobus v. Mut. Ben. Ins. Coo.,* 12 C. E. Gr. 604; s. c., 11 C. E. Gr. 389, sub nom. *Mutual, etc., Co. v. Rowand.*

Two questions may be raised, respecting the record of such judgment, in a collateral proceeding. One respects the jurisdiction of the court upon the subject matter adjudicated upon. The other relates to the existence of the adjudication. The latter question can be tried only by the record, which imports absolute verity, and against which no averment, or proof to the contrary, can be received. *Cutter v. Kline,* 8 Stew. 534; reversing s. c., 7 Stew. 329.

Hence, it cannot be shown collaterally that a judgment was entered as a general judgment instead of a special judgment, by the mistake of the clerk of the Circuit Court, *Cutter v. Kline,* supra; nor that the curtilage upon which the lien is thereby imposed is not the proper curtilage, *Gerard v. Birch,* 1 Stew 317; *Jacobus v. Mut. Benefit Ins. Co.,* supra; nor that the items of claim, which appear, by the record, not to have been furnished by contract were, in fact, so furnished. *Raymond v. Post,* 10 C. E. Gr. 447. See *Hall v. Spaulding,* 11 Vr. 166.

If the record of such a judgment is in fact not what it should have been, but no defect of jurisdiction appears; it must be either amended in the court pronouncing it, or reviewed by writ of error. The Court of Chancery has no power to determine whether a claim, which purports to be a lien, is a lien or not, but only, what is the position, in relation to other encumbrances, of

a claim which the Circuit Court has adjudicated to be a lien. *Cutter v. Kline,* supra. But if it appear that the court was without authority to give the judgment, as where the claim filed did not comply with the statutory requirements in regard to apportioning the claim as between several buildings, and this appeared on its face; the judgment may be collaterally avoided. *Morris Co. Bank v. Rockaway Mfg. Co.,* 1 C. E. Gr. 150. So where lands were bona fide conveyed to a contractor by the owner, after the building was completed pursuant to a duly filed contract; and the contractor thereafter mortgaged them, and then a materialman recovered a special judgment against such contractor, as builder and owner; and the mortgagee then foreclosed, it was held that the mortgage was prior to such judgment, because the claimant had no right to a lien. *Scudder v. Harden,* 4 Stew. 503.

CONCLUSIVENESS OF JUDGMENT AS ESTABLISHING PRIORITIES. Prior to the act of 1884, p. 260, by which mortgagees are required to be made parties, judgment on a lien claim, and sale and conveyance pursuant to special fi. fa. thereupon, did not preclude an encumbrancer from contesting with the purchaser, collaterally, the question, whose title was paramount, *Tompkins v. Horton,* 10 C. E. Gr. 293; *Clark v. Butler,* 5 Stew. 664; and the time of the commencement of the building, upon which the respective priorities of mortgages and lien claims depended, as the statute did not require it to be specified, either in the lien claim or the record of the judgment, could not be shown by such record, even if an entry of it appeared therein; unless it was in some way put in issue and found by the jury. *Gordon v. Torrey,* 2 McCart. 112.

It may be difficult to say just what is the effect of the law as it now stands, on all the questions that suggest themselves, in this connection; but it is probably safe to assume, that while the priorities, as established by a judgment under the present law, cannot be collaterally attacked, as between the parties to the suit, they may still be subject, as formerly, to such attack on the part of others; and that, on such attack, the time of the commencement of the building may be shown, by the record, if it be shown by it; or aliunde the record, if it do not show it, or if it is desired to contradict that date which it does show.

6. VERDICT SPECIAL FINDINGS. If a lien claim is for repairs, as well as for construction, the verdict should find separately the amount due for each class of claim; because the priority of the claim in respect of a purchaser or mortgagee is not the same in the one instance as in the other. *James v. Van Horn,* 10 Vroom 353. As we have seen above, under § 10, note 3, claims for alterations are, by the present revision, made the same, in this respect, as claims for repairs. If the proof shows that items for alterations and repairs, have been blended with items for construction, in a lien claim which purports to be for the latter work only, care must be taken, in moving for a non-suit or a verdict on that ground, to specify the items that are thus erroneously included and why such inclusion is erroneous. Otherwise the

objection will not be considered upon writ of error. *Bell v. Mecum,* 68 Atl. 149; citing, *Van Alstyne v. Franklin Council,* 40 Vroom 672.

FORM OF JUDGMENT. It is of no consequence to the owner whether the summons has been actually served on the builder as that is material only as determining whether the judgment shall be general against the builder. The only judgment that can be entered against the owner, as such is the special judgment. *James v. Van Horn,* 10 Vroom 353. And it is reversible error for the judgment, so far as it purports to be special, to fail to direct the recovery to be made of the land, or the owners interest therein, as well as of the building. There cannot be judgment specially to be made of the building only. *Babbitt v. Condon,* 3 Dutch. 154; *Coddington v. Beebe,* 2 Vroom 477; *Leaver v. Kilmer,* 59 Atl. 643 (E. & A.); and so where the party defendant as owner is a mere licensee there can be no special judgment. *Wm. H. Atkinson Co. v. Shields Co.,* 72 Atl. 81 (E. & A.).

The wording of the statute is peculiar, but it does not mean that a special judgment can be entered only where there has been legal and not actual service of the summons; the special judgment, if the lands are liable, may be entered whether the summons was served "actually" or "legally," *Mut. Benefit, etc., Co. v. Rowand,* 11 C. E. Gr. 389. The language of the statute, that judgment shall be entered against the builder generally, "when he was actually served with the summons;" and that "when only legal service of the summons has been made judgment against the owner and also the builder shall be specially, etc.," does not preclude a general judgment against the builder, although not served within the State, if he has by appearance and plea of the general issue, submitted to the jurisdiction. *Smith v. Colloty,* 40 Vroom 365 (E. & A.).

The plaintiff, if entitled to enter a general and special judgment, may waive either and enter the other. *Cornell v. Matthews,* 3 Dutch. 522.

Reference. Matters of Account. Special Judgment. Priorities. Proceedure.

24a. Any action brought by virtue of the provisions of the act to which this is a supplement and in which matters of account are in controversy may, by rule, be referred to some competent person or persons to state and report an account between the parties and the amount that may be due from either party to the other; and in case a lien is claimed in said action, then, whether the plaintiff is entitled to judgment specially against the building and land in the declaration described, and in case of defendant mortgagees, to report the

priority of liens of the plaintiff and said mortgagee defendants as put in issue by the pleadings in such action.

24b. The practice and procedure respecting such references and upon and after the coming in of the report, and the rights of the parties with respect to trial by jury, shall be the same as in other actions at law in which matters of account are in controversy, and in which references are ordered; and judgment, if entered on the report, shall be given in like manner as now provided by the act to which this is a supplement.

The above, printed as §§ 24a and 24b, is the act of 1905, p. 374, §§1 and 2.

It will be noted that it gives larger powers than were a part of the ordinary powers of the court before its enactment. See *New York Co. v. Kiernan,* 44 Vroom 763.

Amendment of errors and defects of proceedings by Circuit Court or judge.

25. It shall be lawful for the court, or any judge thereof, at all times, to amend all defects and errors in any suit or proceeding under this act, so that the merits of the controversy between the parties may be determined; and that said amendments made be made with or without costs, and upon such terms as to the court or judge may seem fit.[1]

1898, p. 538, § 25; Rev. 1874, § 20.

This section remains the same as when first enacted as § 20 of the Revision of 1874.

1. Prior to this statute the circuit court had power to amend its files and records, even in a mechanic's lien suit (but not the lien claim) under the Practice Act, *Vreeland v. Boyle,* 8 Vroom 346; *Mut., etc., Co. v. Rowand,* 11 C. E. Gr. 389; and so it was held that, before or after plea, the summons against the defendant as builder might be amended so as to be against him as builder and owner, *Cornell v. Matthews,* 3 Dutch. 522; or that, in a suit to enforce a lien against the husband's interest, in an estate by the entirety, the name of the wife might be struck out as a defendant and the suit proceed against the husband only, *Washburn v. Burns,* 5 Vroom 18.

So where the summons was defective and an order was obtained to issue a new summons more than a year after the date of the last item of claim, the service of such new summons was held good and effectual to validate the lien. *Mut. Ben., etc., Co. v. Rowand,* 11 C. E. Gr. 389.

But where the defect is the result of a deliberate choice on the part of the claimant to sue as owner one whom he knows to be not such, an amendment may be refused. *Bartley v. Smith*, 14 Vroom 321.

As is noted above (§ 24, note 5) the way to correct an erroneous judgment is, by having the record amended, if it be erroneous by mistake of fact; by writ of error, for mistake in law. *Cutter v. Kline*, 8 Stew. 534.

Parties in case of death of builder, mortgagee, or owner.

26. In case of the death of the builder or mortgagee the suit on the lien claim may be against the executors or administrators of said builder or mortgagee; and in case of the death of the owner, may be against his heirs or devisees; provided, that if any builder, mortgagee or owner has died or shall hereafter die after the filing of the lien claim and the issuance of the summons pursuant to the terms of this act, then such suit shall not be abated, but shall proceed against the executors or administrators of such deceased builder or mortgagee and against the heirs and devisees of such deceased owner, upon the death of such builder, mortgagee or owner being suggested on the record and upon the names of the executors or administrators of such deceased builder or mortgagee, or the names of the heirs and devisees of such deceased owner being entered on said record; and in any such case, if the time limited by this act for issuing such summons has expired, the summons already issued may be amended as to such deceased party or parties, and the time for the return thereof may be extended, if necessary, and such amended summons shall then be served as other summons are served under this act.

1905, p. 454; 1898, p. 538, § 26; 1866, p. 1015, § 2; Rev. 1874, § 21.

The act of 1866 provided that the lien might be claimed, filed, and enforced by suit, against the executors or administrators of the builder or owner. This statute was construed, in *Robbins v. Bunn*, 5 Vroom 322, and it was there held that it was not the legislative intent to change the judicial construction, previously put upon the act of 1853, in *Edwards v. Derrickson*, 4 Dutch. 39; s. c., 5 Dutch. 468; and *Gordon v. Torrey*, 2 McCart. 112, that the owner when the lien claim is filed is the proper party defendant as such; but that its purpose was to prevent the abatement of the proceedings upon the lien claim, by the death of the builder or owner. It had been decided previously to 1866, in *Ayres v.*

Revere, 1 Dutch. 474 (1856), that where the builder had died after the lien claim was filed, no suit could be maintained to enforce the claim against the builder's administrators; and it was, therefore, also questionable whether the lien could be enforced by suit, if the owner should die after the lien claim was filed; for the same reason, upon which *Ayres v. Revere* was decided, viz.: that the suit could not be maintained against the builders' representatives because the act did not expressly name them as possible parties, applied also to the case of a deceased owner's representatives. The enactment of 1866 was obviously intended to extend the remedy to the case of either a deceased builder or owner, by preventing an abatement by the death of either after the lien claim was filed; and so was the decision in *Robbins v. Bunn*, as above said.

By the Revision of 1874, adopted without change in the Revision of 1898, as § 26, the provision read: "In case of the death of the builder, the suit on the lien claim may be against his executors or administrators; and if the owner be dead, such suit may be against his heirs or devisees."

It was plainly so worded, so as to adopt the construction of the court in *Robbins v. Bunn*, whose suggestion, that the heirs or devisees of the deceased owner, and not his personal representatives, ought to be the parties to be sued, was also adopted. It is to be noted that the provision of the act of 1866, that the lien might be *claimed and filed* (as well as enforced) against the representatives of a deceased builder or owner, was left out of the Revision of 1874 as well as the Revision of 1898, and that it has also been left out of the section as it now stands amended by the act of 1905.

Execution. General or special fi. fa. Separate or combined writ. Successive writs. Docketing judgments in Supreme Court.

27. Where judgment is entered generally against the builder, a writ or writs of fieri facias may issue thereon as in other cases, and when judgment shall be against the building and lands, a special writ of fieri facias may issue to make the amount recovered by sale of the building and lands; and when both a general and special judgment shall be given, both writs may be issued, either separately or combined in one writ, and one may be issued after the return of the other for the whole or residue, as the case may require; and such judgments may be docketed in the supreme court, and execution had thereon as (*in the case of other judgments*).

1898, p. 538, § 27; 1853, p. 437, § 10; Rev. 1874, § 22.

This section is the same as it was when originally enacted in 1853, and as it stood in the Revision of 1874, with the exception that the words in parentheses take the place of the words—"other judgments may be," in the earlier drafts.

See § 24, supra, note 6, that a claimant entitled to a general as well as a special judgment, may waive either and enter the other.

Proceedings under special fi. fa. Sale and conveyance. Estate conveyed. Prior encumbrances. Constructions removable as between landlord and tenant.

28. Under such special fieri facias the sheriff or other officer shall advertise, sell and convey said building and lot in the same manner as directed by law in case of lands levied upon for debt, and the deed given by such sheriff or other officer shall convey to the purchaser the estate which the owner had in the lands at the commencement of the building,[1] or which he subsequently acquired, and also in the building, subject only to all mortgages and other encumbrances created and recorded, or registered prior to the said commencement of the improvement, (*and also subject to the lien of any mortgage given and recorded, or registered, under the circumstances contemplated by and in conformity with the provisions of sections 14 and 15 of this act*)[2]; and in case of gearing or machinery, the bringing of the same upon the premises shall be such commencement; and such prior encumbrances shall have priority to all subsequent builders' liens upon said lands and upon the erections thereon, except such as may be removed, as between landlord and tenant, which may be sold and removed by virtue of any building lien for the construction of the same, free from such prior encumbrances.

1898, p. 538, § 28; 1853, p. 437, § 11; 1863, p. 275, § 1; Rev. 1874, § 23; 1879, p. 71, § 1; 1895, p. 313, § 6.

With the exception of the words in parentheses; which are inserted because of the act of 1879, p. 71, § 1 (now embodied with a material change in § 14) and the act of 1895, p. 313, § 6 (embodied without change or addition as § 15), and the further exception, that the word, "improvement," is substituted for the word, "building," the foregoing section is derived entirely from the act of 1853, § 11, the act of 1863, p. 275, § 1, and the Rev. of 1874, § 23. To facilitate comparison, these three enactments are given below in parallel columns:

1853, p. 437, § 11.

The deed * * shall convey to the purchaser said buildings free from any former incumbrance on the lands, and shall convey the estate in the lands which said owner had at or any time after the commencement of the building, within one year before the filing such claim, etc., subject to all prior encumbrances and free from all encumbrances or estates created by, or obtained against, such owner afterwards, and from all estates and encumbrances created by deed or mortgage made by such owner, or any claiming under him, and not recorded or registered etc. at the commencement of said building.

1863, p. 275, § 1.

The sale * * shall convey — — — —

the estate of the owner in the lands

and in the building — — — subject to all mortgages and other encumbrances created and recorded or registered prior to the commencement of the building: — — —

and in case of gearing or machinery, the bringing of the same on the premises shall be such commencement; and such prior encumbrances shall have priority to all subsequent builder's liens upon said lands and upon all erections thereon, except such as, by law may be removable, as between landlord and tenant, and which may be sold and removed, by virtue of any building lien for the construction of the same, free from such prior encumbrances.

Rev. 1874, § 23.

The deed * * shall convey to the purchaser — — — —

the estate which the owner had in the lands at the commencement of the building or which he subsequently acquired, and also in the building, — — — — — — — —subject to all mortgages and other encumbrances created and recorded or registered prior to the commencement of the building: — — —

and in case of gearing or machinery, the bringing of the same on the premises shall be such commencement; and such prior encumbrances shall have priority to all subsequent builder's liens upon said lands and upon all erections thereon, except such as, may be removable, as between landlord and tenant, and which may be sold and removed, by virtue of any building lien for the construction of the same, free from such prior encumbrances.

1. WHO IS OWNER. As will be seen by reference to the decisions cited under § 16, the person who is to be named as owner is the one who is such at the time the lien claim is filed. Those who succeed to his rights after the lien claim is filed take as purchasers pendente lite and are barred by the proceedings to enforce the lien, although not made parties, except in so far as § 23 provides otherwise as to mortgagees, and as § 26 may now require in the case of the death of the owner or mortgagees.

The words of the present section make the lien bind the estate of such owner and his successors which he had at the commencement of the building or which he subsequently acquired. See as to this the cases cited under § 16; also under § 23, Change of Title; also *Stewart Co. v. Trenton Co.*, 42 Vroom 568.

COMMENCEMENT OF THE BUILDING. It is well established that when the permanent work upon the ground, whether of excavation or of construction, has progressed so far as to inform reasonable observers that it is designed for the erection of a building, then the building has begun. The statute intends such a commencement as shall be an unequivocal notice of an intent to build a building, and so much must, therefore, be done as will apprise observers that a building is in progress. *Jacobus v. Mut., etc., Co.*, 12 C. E. Gr. 604; 11 C. E. Gr. 389, sub nom., *Mut., etc., Co. v. Rowand; Burd v. Huff*, 17 N. J. L. J. 80; *James v. Van Horn*, 10 Vroom 353.

NEW COMMENCEMENT. A change of ownership during the progress of the building does not make a new commencement; nor does an interruption of the work, for a short period, or for months at a time where there is nothing to indicate an intent to abandon the work, when the work is subsequently resumed, without change in the original design and character, *Gordon v. Torrey*, 2 McCart. 112; *Manhattan, etc., Co. v. Paulison*, 1 Stew. 304; but where the owner fails after the work is begun and the work lies abandoned for a long time, and a new purchaser then takes up its completion, after the former work and materials have been paid for, the later beginning of the work is the commencement as to all claims for labor or materials thereafter furnished. *Cueman v. Barnes*, 11 N. J. L. J. 172.

EVIDENCE OF THE COMMENCEMENT. The time of the commencement is not required to be specified either in the lien claim or the record of the judgment; and, unless the fact is in some way put in issue and found by the jury, an entry of the time either in the lien claim or the record of the judgment would be unauthorized and unavailing, as evidence. *Gordon v. Torrey*, 2 McCart. 112. At the time this decision was given, the statute did not provide for making mortgagees parties to the suit on a lien claim, nor that the judgment should determine priorities as between lien claimants and defendant mortgagees, as it now does. See § 24, note 5, Conclusiveness of Judgment as Establishing Priorities.

2. PRIORITIES. In order to comprehend the effect of this statute, in respect of the relative priorities of the lien claim and other encumbrances, it is necessary to read this section and §§ 10, 14 and 15 together, and to carefully analyse their provisions. This analysis is attempted later in this note, as we may, first, stop to notice another matter, namely:

PRIORITY OF LIEN AS TO THE BUILDING ONLY. As will be perceived, the original act of 1853, gave a mechanic's lien priority, in respect of the building, over any previous encumbrance on the land, but made it, in respect of the land, subject to all such previous encumbrances thereon. The result was, that when there was a mechanic's lien and a prior encumbrance, the value of the land and building, and of the land without the building, had to be determined, in order that the relative share of the respective claimants, in the proceeds of sale might be ascertained, *Whitehead v. First Methodist Church*, 2 McCarter 135; *Newark Lime Co. v. Morrison*, 2 Beas. 133; and, as it was obviously inequitable, that this prior right of a lien claimant, in respect of the building, should extend beyond that which his labor or materials had contributed to; it was held, in the case of a claim for additions, that such prior right, as to the building, extended only to such additions, and not to the building to which they were added. *Whitenack v. Noe*, 3 Stock. 413.

This peculiar priority of a lien claim, in respect of the building, had no very long life, in the extent to which it was originally given, by the act of 1853; for the act of 1863, as will be noticed although still leaving the lien claim superior to prior encumbrances on the land, as to buildings actually erected by a tenant (and not by the owner), and removable as between such owner and tenant, *Heidelbach v. Jacobi*, 1 Stew. 544, in all other respects, abrogated the priority in question, and the law, in that respect, has remained unchanged ever since. We now take up the—

ANALYSIS OF §§ 10, 14, 15 AND 28. As will be seen, by reference to § 10, a lien claim, for alterations or repairs, is postponed to bona fide purchasers or mortgagees whose rights accrue before the lien claim is filed. By refernce to § 28, it appears, that all other classes of lien claims are postponed only to such other encumbrances as are created and recorded before the commencement of the building or improvement, or to such mortgages as are given and recorded under the circumstances contemplated by, and in conformity with the provisions of §§ 14 and 15. By reference to §§ 14 and 15, it appears, that, by virtue of their provisions, a lien claim is postponed to a mortgage which is an advance money mortgage, to the extent that it is such, and that money has actually been advanced by the mortgagee for, and has been actually applied to, the building or improvement; if such mortgage is recorded before the lien claim is filed. The priority of a lien claim, as against the claims of non lienors, therefore, depends upon two things, namely, first, the nature of the improvement; and, second, the nature of the non lienor's encumbrance; and

FIRST (*a*). If the lien claim is for repairs or alterations, its priority is determined, as against bona fide purchasers or mortgagees, other than advance money mortgagees, accordingly as the lien claim is filed before or after the rights of such purchasers or mortgagees accrue:

(*b*). As against advance money mortgages, to the extent that the money has actually been advanced and applied to the improvement, its priority is determined accordingly as it was filed before or after such mortgages are recorded; and

(*c*). As to all other non lienor claimants (attaching creditors, and judgment creditors), its priority is determined accordingly as the building was begun before or after such encumbrances attached.

SECOND (*a*). If the lien claim is for anything other than alterations or repairs, its priority is determined, as against advance money mortgagees, to the extent that the money has actually been advanced and applied to the improvement, accordingly as the lien claim is filed before or after such mortgages are recorded; but,

(*b*). As against all other mortgages and encumbrances, the priority of the lien is determined accordingly as the improvement was begun before they were created and recorded.

From this analysis, the somewhat peculiar fact emerges, that the statute gives, to an advance money mortgage, a preference, over a lien claim, which it denies to a mortgage given to secure a general loan. For example, let a building be begun May 1, and let the owner on May 10, borrow $1,000, for his general purposes to which it is applied, from mortgagee A; on June 1, let the owner give a mortgage to B, to secure $1,500, to be advanced for the building and as it progresses, and let the money be so advanced and duly applied; let both mortgages be recorded on the day they are respectively given, and let a lien be filed for $500 on September 1; then the lien claim will be prior to A's mortgage but subject to B's; and, as a result of this fact, if the premises do not sell for enough to pay the lien claim and both mortgages, the later mortgage would seem to have a preference over the earlier mortgage, as will be seen by assuming that the proceeds of sale amount to $2,500, and then figuring out the application thereof.

Or to state the result, of the case supposed, in the form of a syllogism,—

The lien claim is prior to the first mortgage;

The second mortgage is prior to the lien claim; and therefore

The second mortgage is prior to the first.

In this syllogism, both premises are given by the statute, but the conclusion, while therefore inevitable, is, to say the least, startling. But it cannot be impugned on that account; if the legislature has power to pass a law, capable of producing such a result. In *Tompkins v. Horton*, 10 C. E. Gr. 284, it is said, "The mortgagee, whose lien is taken with notice of the liability of the land to the lien created by the statute, etc., cannot complain of a result which he had reason to anticipate, and which he is presumed to have contemplated. Every man must be presumed to know the public laws in existence, and to have contracted with reference to

their provisions." It was, therefore, held that the complainant had no ground to complain of the statute, for postponing his mortgage (taken after the building was begun) to lien claims subsequently filed, and for enabling the proceedings on such lien claims to cut off his rights, as mortgagee, wholly without notice of such proceedings and without an opportunity to litigate the matter. The statute, now in consideration, gives notice of the liability of the land to the prior lien which it creates, in favor of an advance money mortgagee; and so seems clearly valid, in respect of a general mortgage taken subsequently to its enactment. The wisdom or unwisdom of the law, is, of course, entirely beside the question. The legislature has the power to make a law capable of producing the result above pointed out, and it seems to have exercised it.

PURCHASE MONEY MORTGAGES. The statute says that the conveyance, pursuant to a special judgment on a lien claim, shall convey the estate which the owner had at the commencement of the building, etc. Consequently, when, at the time the owner gets title, he also, and as part of the same transaction, gives a mortgage back to secure the purchase price, in whole or in part, the estate, of which he thus becomes seized, is the equity of redemption only, and the mortgage is clearly prior to any lien claim for an improvement begun before such mortgage was recorded. *National Bank v. Sprague,* 5 C. E. Gr. 13; *Strong v. Van Deursen,* 8 C. E. Gr. 369; *Huber v. Diebold,* 10 C. E. Gr. 170; *Macintosh v. Thurston,* 10 C. E. Gr. 242; *Gibbs v. Grant,* 2 Stew. 420; *Clark v. Butler,* 5 Stew. 664; *Bradley v. Byran,* 16 Stew. 396; *Lamb v. Cannon,* 9 Vr. 362; *New Jersey, etc., Co. v. Bachelor,* 9 Dick. 600.

SIMULTANEOUSNESS. The transaction is a single one, if so clearly intended, although there may be a space of time intervening between the manual delivery of the deed and that of the mortgage, *New Jersey, etc., Co., v. Bachelor,* supra; although, in *Huber v. Diebold,* supra, where the vendor and vendee verbally agreed that the vendor was to give a deed and take back a mortgage to secure part of the purchase price, but the deed was delivered more than two months before the mortgage was given (the date of the delivery of the deed, in the absence of other proof, being presumed from the date of the deed), it was held that a lien claim, for work done partly before and partly after the date of the deed, was prior to the mortgage.

THIRD PARTY MORTGAGEE. By an extension of the rule a third person who advances the purchase money to the vendee and takes the mortgage at the same time that the deed is delivered, and as part of the same single transaction, stands in the vendor's shoes, in that behalf; so that there still is conveyed to the vendee only the equity of redemption. *Macintosh v. Thurston,* supra; *Gibbs v. Grant,* supra; *Clark v. Butler,* supra; *New Jersey, etc., Co. v. Bachelor,* supra.

MOMENTARY SEIZIN OF MORTGAGOR. It is frequently said, in the cases above cited, that the priority of a purchase money mortgage is due to the fact, that the seizin of the fee,

by the mortgagor, is so transitory that no lien can attach to it; but, as was distinctly held in *Wallace v. Silsby,* 13 Vroom 1, and, as is emphasized in the able opinion of Vice Chancellor Stevens, in *New Jersey, etc., Co. v. Bachelor,* supra, the true reason is the fact that the mortgagor is not beneficially seized, even for a moment, of anything beyond the equity of redemption.

PURCHASE MORTGAGE SECURING ALSO MONEY BEYOND THE PURCHASE PRICE. It is on the ground last above referred to that the decision in *Macintosh v. Thurston,* supra, is said, by Vice Chancellor Stevens, to rest, in holding that a mortgage had preference over a lien claim, for a building begun between the execution of the contract of purchase and the conveyance, not only to the extent of the purchase price, but also for advances made, pursuant to the contract of purchase, for building the house, improving the grounds, and paying taxes. That is, the vendee's beneficial estate, by the terms of the bargain, was not the fee out of which he was then, by the mortgage, to carve an estate for the mortgagee; but it never was anything but the equity of redemption remaining after first imposing the mortgage, to its full amount, upon the fee.

In *Gibbs v. Grant,* supra, on the contrary, it was held that a mortgage to the full amount secured by it, for money advanced generally to the vendee, as well as for the purchase price, and executed simultaneously with the conveyance, was prior to a mechanic's lien, for a building previously begun, although the mortgagee was a third party, other than the vendor, and the bargain, between the vendor and vendee, did not contemplate anything but a conveyance of the land to the vendee, upon the payment of the agreed price thereof.

Vice Chancellor Stevens, in *New Jersey, etc., Co. v. Bachelor,* supra, insists that the decision, in *Gibbs v. Grant,* does not control the question in consideration as it does not appear to have been there distinctly raised and passed upon, and he, therefore, in the Bachelor case, where the facts were, in substance, identical with those in *Gibbs v. Grant,* held that the mortgage was prior to the mechanics' lien, to the extent of the purchase price secured by it, but was subject to the lien claim, to the extent of the residue secured by it.

It is to be noted that in *Macintosh v. Thurston* and *Gibbs v. Grant,* the rights of the parties were vested before the act of 1879, p. 77, was passed (see § 14 above), and that the Bachelor case was not within the scope of that act, and that the rights of the parties therein were vested before the act of 1895, p. 313, § 6 (see § 15 above), was passed.

PURCHASE MORTGAGE IN PLACE OF PRIOR MORTGAGE RELEASED. Where the vendee, in order to free the title he is seeking to acquire, from the lien of a prior mortgage, covering other lands and securing a very large sum of money, at the same time that he takes the conveyance, gives to such prior mortgagee a new mortgage, to secure a less sum, and receives a release of his land from such prior mortgage, such new mortgage

is a purchase money mortgage, and is, therefore, prior to a lien claim for a building begun by the vendee before the deed and mortgage are delivered. *Clark v. Butler,* 5 Stew. 664. This case was referred to in the Bachelor case above mentioned. The reason of the decision is, that the beneficial estate, conveyed to the vendee, was the equity of redemption only.

In *Kittredge v. Newmann,* 11 C. E. Gr. 195, the facts were similar to those in *Clark v. Butler* with the very important difference that, in the Kittredge case, both the vendor and vendee were married women, neither of whom had filed any dissent, and as the lien had attached to the vendor's estate before the conveyance to the vendee, the court was obliged to hold that the lien claim was prior to the mortgage.

SUBROGATION. Akin to the case of a purchase mortgage to a person other than the vendor, is that of a mortgagee whose mortgage, while created and recorded after the building is begun, is given to secure moneys loaned by him to pay off a prior mortgage held by another person and existing before the building was begun, in which case it is held that such new mortgage has an equity *in the land,* prior to a lien claim, quoad the amount so paid on the prior mortgage, by right of subrogation, even although a transfer of the mortgage, upon such payment, is not made, as it regularly should have been. *Barnett v. Griffith,* 12 C. E. Gr. 201. So where a mortgagee whose mortgage is subject to several lien claims, pays a judgment recovered on one of such claims, he is entitled, on petition, to be subrogated to the rights of the judgment claimant and entitled to use the judgment for all purposes for which it would be useful to him. *Egbert v. De Camp,* 3 N. J. L. J. 284.

INCHOATE RIGHT OF DOWER. A mechanics lien against the land of a man, whose wife, at the time the building is begun, is an infant, is subject to the wife's inchoate right of dower, *in the land,* apart from the improvement put thereupon. *Barnett v. Griffith,* 12 C. E. Gr. 201. Perhaps by virtue of § 13, supra, this would not be so in the case of a married woman of full age, and so capable of filing a dissent.

MERGER OF MORTGAGE. Where lands are subject first to a mortgage and next to lien claims, and the equity of redemption is purchased by a third person who, subsequently, at sheriff's sale on foreclosure of the mortgage, purchases the premises, the title so purchased is freed from the lien claims, as the title by foreclosure sale does not merge in the prior title by the conveyance of the equity of redemption. *Lamb v. Cannon,* 9 Vroom 362.

SUBSTITUTION. Where a mortgagee, whose mortgage is prior to a mechanics lien, but which covers other lands, as well as those subject to such lien, at the request of the mortgagor, and without consideration, releases such other lands after the building was begun, but in good faith and without knowledge, of the existence of the lien claim, although with knowledge that the building was begun; the lien claimant cannot claim the benefit of such release as against such mortgagee. *Ward v. Hague,* 10 C. E. Gr. 397.

CREATION OF MORTGAGE. If a mortgage be recorded before the building is begun, under an agreement that it is to be delivered thereafter to the mortgagee when the money secured by it is advanced, it may be considered, by relation, to have been created at the time of its record or even at the time the bargain was made. *Jacobus v. Mut., etc., Co.,* 12 C. E. Gr. 604; reversing s. c. 11 C. E. Gr. 389. But the purchaser of mortgage bonds, who buys of the mortgagor with knowledge that there are building liens which must be enforced because of the latter's insolvency, is not entitled to priority over such lien claims, although he paid a present consideration for such bonds, and the mortgage was recorded before the building was begun. *Porch v. Agnew Co.,* 4 Rob. 328. Such a purchaser is not a purchaser in good faith in open market, nor is he like a person who is bound to advance money upon a mortgage. See generally the notes as to advance money mortgages under § 14.

The statute is, of course, perfectly clear that a mortgage, created and recorded after the building is begun, is subject to lien claims, except so far as §§10, 14 and 15, already considered, may provide otherwise. To this point the cases already above cited in these notes to this twenty-eighth section, may be cited. See, also, *Mechanics, etc., Co. v. Albertson,* 8 C. E. Gr. 318; *Erdman v. Moore,* 29 Vroom 445; *Currier v. Cummings,* 13 Stew. 145.

And where there was a filed contract, by which the builder undertook to do all the work and furnish all the materials, but the owner himself purchased and furnished some of the materials, contrary to the contract, and pending the building gave a mortgage to secure moneys loaned to him, a lien claim for the materials so furnished by the owner does not lose its priority over such mortgage because of the fact that the mortgagee was unaware of the owner's act and supposed that the builder had furnished all that the contract called for. *Mechanics, etc., Co. v. Albertson,* 8 C. E. Gr. 318.

Concurrence of lien claims. Distribution of proceeds of sale pro rata. Time of distribution. Caveat against claims. Rules of practice and pleading, etc., to be made by Circuit Court.

29. All lien claims for erecting, (*adding to, repairing or altering*) the same building shall be concurrent liens upon the building and the land whereon the same is erected, and shall be paid pro rata[1] out of the proceeds thereof, when sold by virtue of this act; and for the purpose of distribution, the sheriff or other officer shall pay such proceeds to the clerk of said circuit court, to be by said court distributed[2] among such claims filed, or as shall be filed according to this act before petition filed in said court for distribution thereof, and

among such only; but the amount paid to any claimant shall not be paid over to him until after his claim shall have been filed for three months; and if a caveat be filed against such claim by the owner, or by any claimant or claimants owning together one-third of the lien claims filed against such building, then not until such claim shall have been established by a special judgment thereon;[2] and such circuit courts shall have full power to adopt such rules of practice and pleading, and to make all orders necessary and proper to carry into effect the objects of this act, and to secure a proper disposition of the proceeds of sales to all persons entitled thereto by the provisions of this act.

1898, p. 538, § 29; 1853, p. 437, § 14; Rev. 1874, § 24.

The words in parentheses are added in the Revision of 1898, otherwise the act reads the same now as when originally enacted in 1853, and re-enacted in the Revision of 1874.

1. By virtue of § 6, ante, the claims of journeymen or laborers for wages are given a preference over other lien claims. The result would seem to be that all lien claims of the same class are concurrent inter se; but that claims for wages as a class are prior to other claims.

If the land has been sold under foreclosure of a mortgage, to which the lien claims are prior, they share the fund produced pro rata. *Stiles v. Galbreath,* 3 Rob. 222; aff. s. c. 1 Buch. 299. See, also, *Federal Trust Co. v. Guigues,* 74 Atl. 652.

2. Independently of this, or of any other statutory provisions, the power of the court, issuing process, under which moneys are made, to direct the disposition thereof seems to be ample. The command of such process (and the process of execution on a lien claim is no exception) always is that the sheriff have the moneys in court to render, etc. Anciently this command was required to be strictly obeyed in all cases; and although, by a permissive departure from such command, it is now the usual and proper practice for the sheriff to pay the proceeds out of court to the party entitled thereto, the court has neither surrendered nor lost its power to compel the money to be paid into court according to the command of the writ, and to direct its disposition when it is so paid in. *Stebbins v. Walker,* 2 Green 90. Such power, of course, is limited to moneys made under its own process. *Woodruff v. Chapin,* 3 Zab. 566; and the jurisdiction to determine the disposition thereof is exclusively vested in such court, and the propriety of its determination cannot elsewhere be called in question, except by proper proceedings to review it for error in law. *Heinselt v. Smith,* 5 Vr. 215.

The power will be exercised wherever there is good reason

therefor, as where there is a dispute as to which of two executions is entitled to the proceeds, or where there are surplus moneys, after satisfying the execution under which the sale is made, which are subject to the equitable liens of subsequent claimants. *Matthews v. Warne,* 6 Halst. 695; *Williamson v. Johnson,* 7 Halst. 86; *Sterling v. Van Cleve,* 7 Halst. 285; *Cox v. Marlatt,* 7 Vroom 389; *Woodruff v. Chapin,* supra; *Stebbins v. Walker,* supra, overruling, *Thompson v. Pierson,* 2 Pen. 1019; and the sheriff may, at all times, voluntarily pay the proceeds into court, for his own security, and to relieve himself from the responsibility of deciding upon the validity or priority of conflicting claims, *Stebbins v. Walker,* supra; *Woodruff v. Chapin,* supra; although he ought not to do so without good reason therefor. *Shallcross v. Deats,* 14 Vroom 177.

To obtain an order that the money be paid into court, neither written pleading or proof is necessarily essential. *Gifford v. McGuinness,* 53 Atl. 87 (E. & A.).

But whether the money be paid in voluntarily, or upon due order, the money, when once it is brought in, not only may, but must, be finally disposed of by the court, whether it be the Supreme or Circuit Court or the Common Pleas, and the power of either court, in making such disposition, is not limited to a case where all the contending claims are founded on executions issued out of the same court; nor is it necessary that the court shall have jurisdiction of the persons of the parties having conflicting claims by their being parties of record in a suit pending in said court. *Woodruff v. Chapin,* supra.

Even if the rights of the parties are so complicated that they can be settled only by a resort to a court of equity, the court should none the less direct the moneys to be brought in and retained until the parties have had an opportunity to apply to that forum. *Stebbins v. Walker,* supra.

Recurring now to the provision of the statute, requiring the sheriff to pay the proceeds of sale into court, we apprehend that its effect is to make the sheriff answerable to a claimant without regard to whether or not he has actual knowledge of his claim. That, we think, is its only effect. The sheriff could always discharge himself of liability by paying the proceeds of his sale into court. The statute makes no change in that. So also the sheriff could always discharge himself of liability to any claimant, by paying him his claim, out of court; and when there is no question, as to who is entitled to the money, or as to the amount, it would be vexatious for him not to do so. The statute has not changed that. But the sheriff could not be held to account, for his proceeds of sale; if he paid them out of court to the parties who would have been entitled to them, had there been no other claimants; *when he had no actual knowledge before so paying them, that there were any such claimants, State v. Salem Pleas,* 5 Halst. 319; *Stebbins v. Walker,* 2 Green 90, 98; and, in this respect, the statute has made a different rule. On ordinary process the sheriff is not bound to search the records, to

see if there are other claimants having a lien upon the property upon which he levies and which he sells. If there are such claimants they must give him notice, in order to protect themselves. But when he sells under a special fieri facias on a lien claim, the statute, as we apprehend it, requires him to take notice of all lien claims that are of record, if he chooses to pay over the proceeds out of court; and precludes him from setting up any such disposition thereof, as against any such claim which he may have overlooked.

It is obvious that it is advisable for claimants to take care that the sheriff does have actual notice of their liens; and this is not only advisable but necessary in the case of mortgagees and judgment creditors of the owner, whose encumbrances are subsequent to lien claims. These encumbrancers are clearly entitled to any surplus proceeds after the lien claims are satisfied; but the sheriff is not, we think, bound to take notice of them, as he is of lien claims.

ORDER OF DISTRIBUTION, PRACTICE. We think that the owner or any lien claimant, or other subsequent encumbrancer, can apply for an order to distribute the proceeds. A petition should be presented and filed, setting forth all the necessary facts in regard to the fund to be distributed, the names of the claimants, and their respective claims, etc. In *Hall v. Spaulding,* 11 Vroom 166, upon such a petition, a reference was ordered to ascertain and report the amount of the several claims and the persons to whom due. In *Crouse v. Lewis,* 30 Vroom 288, as far as the circuit files show, an order of distribution appears to have been made, with nothing but a verified petition before the judge, together with proof that the claimants therein named had been served with notice, that application would be made for an order for distribution "between the several lien claimants who have filed claims against said premises."

We apprehend that it is open to any claimant, on the application to order distribution, to litigate the merits of any other claim, which has not been established by a judgment; even although it may have been on file for three months, and although no caveat is filed against it before the petition comes in. Before, therefore, an order is made, there should be due proof that all the persons entitled to be heard have had notice and an opportunity to offer proofs. The order, when made, is reviewable on error, *Hall v. Spaulding,* supra; *Crouse v. Lewis,* supra; and on such proceeding to review, all persons interested must be made parties; and where one party brings the writ, he should issue it in the name of all the claimants, and then proceed by summons and severance. *Crouse v. Lewis,* supra.

3. JUDGMENT ON CONCURRENT LINES. There is nothing, in this section, to prevent all of several claimants from obtaining special judgments, on their claims, although the next section provides that the claimant who first issues a summons may obtain an order of the court to stay subsequent suits until judgment in the first suit is obtained, under certain circumstances.

But it is probably illegal to issue execution, on any of the subsequent judgments, so obtained after the property has been sold, under an execution issued on the prior judgment; but where one lien claimant obtained a special judgment, under which the premises were sold, and subsequently another lien claimant took a special judgment and had a fieri facias issued and levied, on the same property, and the purchaser, under the first judgment, then moved the court to set aside the subsequent fieri facias, the court declined to take that action apparently on the ground that the purchaser had an adequate remedy by ejectment, if he was disseized, or by suit to quiet title, if he was not, and that the rights of parties ought to be left to such action and not decided in a summary way. It was also intimated that the purchaser might be entitled to the aid of the Court of Chancery to restrain the sale, under such fieri facias. *Murphy v. Borden,* 20 Vroom 527.

Stay of subsequent suits until determination of first suit.

30. Where a summons has been issued and served in any way prescribed by this act, to enforce any building claim lien against any building and lands, all other suits commenced by summons subsequently issued, to enforce concurrent liens against the same building and lands, may be stayed by the claimant therein, or by order of the court, until judgment in such first suit, unless notice to enforce such other claim has been served, or a caveat has been filed against paying the same, as hereinbefore provided.

1898, p. 538, § 30; 1853, p. 437, § 16; Rev. 1874, § 25.

This section is the same as when originally enacted in 1853 and re-enacted in the Revision of 1874.

See note to § 29.

Discharge of lien by, 1. Payment to claimant; receipt, etc. 2. Payment to county clerk. 3. By expiration of time. 4. By failure to sue on 30 days' notice; affidavit. 5. By order of circuit judge.

31. Such land and building may be discharged from any lien created by this act:

I. By payment and receipt therefor, given by such claimant, which, when the same is executed in the presence of, and is attested by any officer entitled to take the acknowledgedgment of the execution of a deed, or when acknowledged or proved before such officer, shall be filed by such clerk, and

the words "discharged by receipt" shall be entered by him in said lien docket, opposite the entry of said lien;

II. By paying to said county clerk the amount of said claim (*with interest and costs*); which amount said clerk shall pay over to said claimant;

III. By the expiration of the time limited for issuing a summons on such lien claim, without any summons being issued, or without notice thereof endorsed on said claim;

IV. By filing an affidavit that a notice from the owner to the claimant, requiring such claimant to commence suit to enforce such lien in thirty days from the service of such notice; and the lapse of thirty days after such service without such suit being commenced, or without any entry of the time of issuing such summons being made on such claim;

V. When it shall be made to appear by affidavit or otherwise, to the satisfaction of the justice of the supreme court holding the circuit court in the county wherein said lien is filed, that said lien has been duly paid and satisfied, and that the claimant under said lien, and his attorney, have died or removed from this state since the filing of said lien, and said lien still remains on record as unsatisfied, the judge of said court shall have power to forthwith order the clerk of said court to enter a discharge of said lien in said lien docket, opposite the entry of said lien.[1]

1898, p. 538, § 31; 1853, p. 437, § 13; Rev. 1874, § 26; 1896, p. 103.

Clause V. was added by the act of 1896 p. 103; the words,—"with interest and costs," in clause II, were inserted first in the Revision of 1898; except for these two changes, the section is the same as when originally enacted in 1853, and re-enacted in the Revision of 1874.

1. The act, in relation to quieting titles, applies to the case of a lien claim; and a lien claimant, who does not file his claim before a foreclosure suit is begun, and who does not apply to be made a party therein, is barred of his claim by the foreclosure decree. *Raymond v. Post,* 10 C. E. Gr. 447.

When a person executes a release of his right of lien, and another upon the faith of such release takes a mortgage, the release will be held to cover the entire claim of such releasor for items subsequent, as well as prior to such release. *Manhattan Assn. v. Massarelli,* 42 Atl. 284.

Discharge of lien by deposit with county clerk and notice to retain until claim be established. Repayment of such deposit or surplus, thereof.

32. Any landowner desiring to contest any claim, and to free his building and land from the lien thereof, may pay to the county clerk the amount of such claim, with interest thereon, for six months after such payment, and twenty-five dollars in addition thereto, with notice to said clerk not to pay over the same until such claim be established by suit; which sum, or so much thereof as is necessary, shall be paid to such claimant upon his obtaining judgment against such building and lands, in the manner prescribed by this act, and said claim shall from the payment of such money to such clerk, be a lien on said money, and said buildings and lands shall be discharged therefrom, and no execution shall issue against the same by virtue of such judgment; but if such suit is not commenced within the time at which the said lands would be discharged by the provisions of this act without suit, or in case judgment be given therein without being against said lands, said sum shall be repaid to him by said clerk, and if judgment be given against such lands for an amount less than that so deposited, then the surplus shall be returned by said clerk to said landowner.

1898, p. 538, § 32; 1853, p. 477, § 15; Rev. 1874, § 27.

This section is the same as when originally enacted in 1853 and re-enacted in the Revision of 1874.

General repeal of other acts.

33. The act entitled "An act to secure to mechanics and others payment for their labor and materials in erecting any building (Revision), approved March 27th, one thousand eight hundred and seventy-four, and all acts amendatory thereof and supplemental thereto, except so far as incorporated herein and re-enacted herein, are hereby repealed; and all acts and parts of acts, general and special, inconsistent with this act, are hereby repealed: but this repealer shall not revive any act heretofore repealed.

1898, p. 538, § 33.

Rights vested under prior statutes saved. Practice or procedure to follow this act.

34. The repeal of any statutory provision by this act shall not affect or impair any act done or right vested or accrued or any building lien filed or any proceeding, suit or prosecution commenced before such repeal take effect; but every such act done or right vested or accrued or building lien filed, or proceeding, suit or prosecution had or commenced, shall remain in full force and effect to all intents and purposes, as if such statutory provision so repealed had remained in force, except that where the course of practice or procedure for the enforcement of such right or such building lien or proceeding, suit or prosecution shall be changed, all suits pending or thereafter commenced shall be conducted as near as may be in accordance with such altered practice or procedure.

1898, p. 538, § 34.

See *Barnaby v. Bradley & Currier Co.*, 31 Vroom 158 (E. & A.)

Construction of Terms. Singular number; masculine gender, bodies corporate.

35. Whenever in describing or referring to any person, party, matter or thing, any word importing the singular number or masculine gender is used in this act, the same shall be understood to include, and shall apply to, several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it be otherwise provided, or there be something in the subject or context repugnant to such construction.

1898, p. 538, § 35.

CHAPTER III.

The Municipal Improvements Lien Act of 1892.

(147)

THE MUNICIPAL IMPROVEMENTS LIEN ACT OF 1892.

The legislature of New Jersey in 1891 passed an act entitled, "An act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon, or furnishing, materials toward the performing of any work in public improvement in cities in this state." Acts of 1891, p. 418, §§ 1-15, approved April 14, 1891.

In 1892 the legislature passed an act entitled, "An act to secure the payment of laborers, mechanics, merchants, traders, and persons employed upon, or furnishing materials toward the performing of any work in public improvements in cities, towns, townships and other municipalities in this state." Acts of 1892, p. 369, §§ 1-15, approved March 30, 1892.

This later act was substantially the same as the act of 1891, with such changes as were necessary to make its provisions applicable to all municipalities generally, and repealed the earlier act so far as it was inconsistent with its provisions.

Both these acts, as was pointed out in *Delafield Co. v. Sayre*, 31 Vroom 449, were copied from the New York statute of 1878, c. 315, in nearly the same words. In that case actions at law had been brought in the Essex Circuit Court to enforce liens claimed under this statute. The jurisdiction thus invoked was challenged, and on error, in the Court of Errors and Appeals it was determined that such actions could not be brought at law, but must be instituted in the Court of Chancery. The opinion (by Justice Dixon) is so valuable a review of the provisions of the act that the following liberal quotations are here made from it:

"On examining the statute it is perceived that, while it provides for a civil action, it does not, in explicit terms, declare where that action shall be brought, nor do the names used in relation to the procedure indicate the appropriate tribunal, for, while some of them, e. g., summons, judgment,

point to courts of law, others, e. g., answer, appeal, point to the Court of Chancery. The enactment that, when separate actions are commenced, the court in which the first action is brought may consolidate them, is more significant, because it suggests the possibility of suits being instituted in several courts, and in this state there is but one Court of Chancery. But since there is in our law no mode provided for consolidating actions pending in different tribunals, this enactment is futile, and should not be deemed of controlling force as an indication of the legislative purpose with regard to the court whose jurisdiction was to be invoked. It is only a circumstance to be considered in the inquiry. It loses some of the force to which it otherwise might be entitled when we discover that our act is copied almost verbatim from a statute of New York, where there is no Court of Chancery, and where legal and equitable remedies are administered by the same tribunals. ——————— it appears in our statute merely because the copyist lacked either the knowledge or the forethought needed to suggest terms adapted to our judicial system.

"The safest guide ——— is to be found by considering the nature of the right and the main features of the remedy proposed.

"The right is one granted to those who perform labor or furnish materials in the making of a public improvement in any of the municipalities of this state, and it consists of a lien upon the money in the control of the municipality due or to grow due for such improvement, to the contractor who owes for such labor or materials. After the claimant has perfected his lien by filing due notice of his claim with the proper officers of the municipality, he is to enforce it by a civil action, in which the municipality, the contractor, and all persons who may in like manner have secured liens on the same fund, are to be made defendants, and in that action the court is to determine the validity of each lien claim, the amount due upon it, and the amount due to the contractor from the municipality, and is to render judgment directing the municipality to pay over to the several lienors the sums found to be due to them respectively, so far as the fund will go, and according to the priority prescribed by the act. The statute also authorizes the contractor or the municipality to institute a simliar action for the determination of the claims,

bringing before the court all persons interested in the disposition of the fund. There is no provision for a personal judgment against the contractor as a debtor, but the right of the claimants to obtain such judgments against him in other actions is expressly preserved.

"Such suits as this statute contemplates are unknown to the common law. There is a slight resemblance between them and proceedings by attachment, and to enforce the statutory lien of mechanics and materialmen against real estate, but these proceedings are much simpler and are brought in the legal tribunals by express direction of the legislature.

"On the other hand, the remedy now under consideration comes completely within the ordinary remedial functions of the Court of Chancery (citing and quoting from 1 Pom. Eq. Jur. 95)."

The following table of cases which have arisen under this act may be found useful. They are arranged in chronological order:

Trenton Comrs. v. Fell, 7 Dick. 689; s. c. 29 Atl. 816;

Delafield Co. v. Sayre, 31 Vroom 449; s. c. 38 Atl. 666;

Camden Wks. v. Camden, 15 Dick. 211; s. c. 47 Atl. 220; s. c. on app. 19 Dick. 723; 52 Atl. 477;

Garrison v. Borio, 16 Dick. 236; s. c. 47 Atl. 1060;

Norton v. Sinkhorn, 16 Dick. 508; s. c. 48 Atl. 822; s. c. on app. 18 Dick. 313; 50 Atl. 506.

Hall v. Jersey City, 17 Dick. 489; s. c. 50 Atl. 603; s. c. on app. 19 Dick. 766; 53 Atl. 481.

Kelaher v. English, 17 Dick. 675; s. c. 50 Atl. 902;

Garretson v. Clark, 57 Atl. 414.

Pierson v. Haddonfield, 21 Dick. 180; s. c. 57 Atl. 471;

Wilson v. Dietrich, 59 Atl. 250;

Roselle Park v. Montgomery, 60 Atl. 954;

Somers Co. v. Souders, 4 Rob. 388; s. c. 61 Atl. 840; s. c. on app. 70 Atl. 158; 1 Buch. 759;

Herman & Grace v. Essex Co. Comrs., 64 Atl. 742; 1 Buch. 541; aff. June term, 1907; 3 Buch. 415, 416, 417; 75 Atl. 1101;

United States Co. v. Newark, 66 Atl. 904;

Arzonico v. West New York, 69 Atl. 450;

Union Stone Co. v. Hudson Co., 1 Buch. 657; 65 Atl. 466.

National Fire Proofg. Co. v. Daly, 74 Atl. 152;

United States Co. v. Newark, 74 Atl. 192;

Hazard v. Bd. of Ed., 75 Atl. 237;

The text of this act of 1892, with notes of decisions, in cases arising under its provisions, is presented herewith.

Lien given upon the contract price, to persons furnishing labor or materials for any public improvement.

Section 1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey,* That any person or persons who shall hereafter as laborer, mechanic, merchant or trader,[1] in pursuance of, or in conformity with the terms of any contract for any public improvement made between any person or persons and any city, town, township or other municipality[2] in this state authorized by law to make contracts for the making of any public improvement, perform any labor or furnish any material toward the performance or completion of any such contract made with said city, town, township or other municipality, on complying with the *provisions* of this act, shall have a lien for the value of such labor or materials or either, upon the moneys in the control of the said city, town, township or other municipality, due or to grow due under said contract with said city, town, township or other municipality, to the full value of such claim or demand, and these liens may be filed and become an absolute lien to the full and par value of all such work and materials, to the extent of the amount due or to grow due under said contract, in favor of every person or persons who shall be employed or furnish materials to the person or persons with whom the said contract with said city, town, township or other municipality is made, or the sub-contractor of said person or persons,[3] their assigns or legal representatives; *provided, that liens may be filed only by such laborers, mechanics, merchants or traders as shall have performed any labor or furnished any material toward the performance or completion of any such contract directly for or to the person or persons, with whom the said contract with said city or municipality is made, or the sub-contractor of said person or persons, their assigns or representatives, and no lien shall or may be filed on behalf of any laborer, mechanic, merchant or trader, for labor performed or material furnished to any other person that the said contractor with the said municipality or a sub-contractor on any such contract, notwithstanding such material may have been actually used in the performance of the said contract; provided, further,* that no city, town, township or other municipality shall be required to pay a greater amount than the contract price or value of the

work and materials furnished, when no specific contract is made in the performance of said work by the contractor.[4]

The foregoing is the text of section 1, as amended by the act of 1909, p. 260. The changes made by the amendment, consisted in the insertion of the italicized word, *provisions,* in place of the former reading, *second section,* and the new addition of the other words which are above italicized.

1. A MANUFACTURER OF IRON who furnishes iron pipes to a contractor building a city water works is, within the terms of the statute, a mechanic, merchant or trader employed on or furnishing materials for a public improvement. *Camden Wks. v. Camden,* 15 Dick. 211; 19 Id. 723.

2. THE WORDS, "OTHER MUNICIPALITY," include a county. *Garrison v. Borio,* 16 Dick. 236; *Norton v. Sinkhorn,* 16 Dick. 508; 18 Id. 313; *Union Co. v. Hudson Co.,* 1 Buch. 657; *Herman v. Essex Co.,* 64 Atl. 742; also a school district, *Comrs. v. Fell,* 7 Dick. 689.

3. As the act originally read, it was held that the lien given was not limited to claimants who furnished labor or materials directly to the original contractor or his assigns, but extended also to claimants who could show that their labor or materials were furnished for, and used in, the improvement, although such claimant were not a creditor of the original contractor or even of his sub-contractor. This construction was first given by Vice Chancellor Grey in the case of *Garrison v. Borio,* 16 Dick, 236, and was followed, in the Court of Chancery, in the subsequent cases of *Wilson v. Dietrich,* 59 Atl. 250 (Grey); *Herman & Grace Co. v. Essex Comrs.,* 64 Atl. 742 (Emery); *National, etc., Co. v. Daly,* 74 Atl. 152 (Stevens); and *Hazard v. Bd. of Ed.,* 75 Atl. 237 (Howell). In *Hall v. Jersey City,* 19 Dick. 766, the Court of Errors and Appeals had repudiated a dictum of Vice Chancellor Pitney's in that case, 17 Dick. 489, which might have been taken as asserting the same view, and had intimated plainly that they deemed the true construction of the statute to be that the lien of claimants must be limited to such only as were creditors of the original contractor. There were very cogent reasons, we think, which should have led that court to adhere to the construction that it thus intimated its approval of; but when the *Herman and Grace* case came before it on appeal the decision was affirmed, though without opinion (June term, 1907, see *Arzonico v. West New York,* 46 Vroom 21; and see also *Herman & Grace v. Essex Co.,* 3 Buch. 415; *Same v. Same,* 3 Buch. 416; *Same v. Sayward,* 3 Buch. 417), and the construction given in *Garrison v. Borio,* was thus approved.

By the amendment of April 19, 1909, the legislature has now, apparently, enacted that the lien given extends to all creditors of the original contractor, or of his sub-contractor, or of their re-

spective assigns or representatives, but not to any claimant who is not such a creditor.

It was held in *Garrison v. Borio*, that the language of the fifth section limits the right of a claimant, who is a creditor of a sub-contractor, to the amount due from the contractor to such sub-contractor at the time the claimant's notices of claim are filed. If, at that time, the contractor has wholly discharged his debt to his sub-contractor, the claimant can have no lien; if he has discharged such debt in part, the claimant can have a lien upon the fund to the extent only of the unpaid balance due from the contractor to his sub-contractor. See also *Meurer v. Kilgus*, 75 Atl. 899 (Ch.).

THE LIEN GIVEN DOES NOT EXCLUDE THE CLAIMANT'S RIGHT, IN A PROPER CASE, TO PROCEED UNDER § 3 of the mechanic's lien act by notice, etc. *Arzonico v. West New York*, 69 Atl. 540; *Delafield v. Sayre*, 31 Vroom 449; *Camden v. Camden*, 47 Atl. 220; *Garrison v. Borio*, 47 Atl. 1060; *Norton v. Sinkhorn*, 48 Atl. 822; *s. c.*, 50 Atl. 506; *Hall v. Jersey City*, 50 Atl. 603; *Kelaher v. English*, 50 Atl. 902.

4. It is difficult to read this PROVISO to any certain intent. The conjecture is hazarded that it intends to say that when the contract, between a claimant and the municipal contractor, for work or materials supplied the latter, and by him used in the performance of his contract with the municipality fails to specify the price to be paid therefor, the fund shall be liable to such claimant for such work or materials at no greater rate than that fixed by the municipality's contract as the rate by which its contractor is to be paid therefor. As some time has been spent in puzzling over it, this note is given for what it may be worth.

We venture the comment that the legislature in the amendatory legislation of 1909 would have been wiser, if they had reworded this proviso so as to make it intelligible, and if they had limited the lien given to such claimants as are creditors of the original contractor only.

Notices of claim when to be filed, and where. Contents of such notice, and verification thereof.

Sec. 2. *And be it enacted*, That at any time before the whole work to be performed by the contractor for any such city, town, township or other municipality is completed or accepted by said city, town, township or other municipality, and within fifteen days after the same is so completed or accepted,[1] any claimant may file with the chairman or head of the department, council, board, bureau or commission having charge of said work, and with the financial officer[2] of said city, town, township or other municipality, notices stating the residence of the claimant,[3] verified by his oath or

affirmation, stating the amount claimed,[4] from whom due,[5] and if not due, when it will be due,[6] giving the amount of the demand[7] after deducting all just credits and offsets,[8] with the name of the person by whom employed, or to whom the materials were furnished[9]; also a statement of the terms, time given, conditions of his contract,[10] and also that the labor was performed or materials were furnished to the said contractor,[11] and were actually performed or used in the execution and completion of the said contract with said city, town, township or other municipality,[12] but no variance as to name of the contractor shall affect the validity of the said claim or lien; *provided, however, that the filing of such notice shall not operate as a lien against such moneys as may be due, or to grow due, under the said contract, unless the person or persons serving such notice shall, at the same time, file with the financial officer of the said municipality a bond in a sum to be fixed by such financial officers not to exceed twenty per centum of the amount claimed in said notice, which said bond shall be conditioned for the payment of legal interest for the time the said moneys may be withheld from the said contractor in the event that the said claimant does not perfect his lien by instituting an action or that decree be made in favor of the said contractor in any such action, and conditioned further for the payment of the costs of any such action if judgment be for the contractor.*

This is the section as amended by 1909, p. 260, § 2, which added the proviso which we have italicized. See also post, § 15.

1. THE CLAIM CAN BE FILED before the improvement is completed; and has effect whether the contractor is proceeding with the performance, or has abandoned it. *Pierson v. Haddonfield*, 21 Dick. 180.

The statute offers but two periods during which the notice of claim can be filed, viz.: (1) before the work is completed; and (2) within fifteen days after it is either accepted or completed, whichever comes first. *Somers Co. v. Souders*, 4 Rob. 388; aff. 70 Atl. 158; 1 Buch. 759.

2. The city comptroller is, par excellence, the FINANCIAL OFFICER upon whom notice should be served. *Hall v. Jersey City*, 17 Dick. 489; 19 Id. 766.

The district clerk, or the custodian of the school moneys of the district, are either of them the proper financial officer of the school district; but the borough or township collector or treasurer, as such, is not. *Hazard v. Bd. of Ed.*, 75 Atl. 237.

The claimant must file the two notices required by the statute. *Hazard v. Br. of Ed.,* supra.

3. The affidavit annexed to the notice of claim is part of the notice, and the CLAIMANT'S RESIDENCE is sufficiently stated, if stated only in such affidavit. *Hall v. Jersey City,* 17 Dick. 489; 19 Id. 766.

If the claimant is a corporation its residence is sufficiently stated by stating the State wherein it was incorporated. *Hall v. Jersey City,* supra; *National, etc., Co. v. Daly,* 74 Atl. 152.

The statute requires all the particulars, which the notice must set forth, to be verified by the claimant's oath; it does not mean that the residence of the claimant is the only fact which is to be thus verified. *National, etc., Co. v. Daly,* supra.

If the affidavit is not a general verification of the contents of the notice but merely asserts that the notice is a true account of materials furnished together with dates and prices, it does not verify the terms, time given, and conditions of the claimant's contract, although those particulars are also stated in the notice. *National, etc., Co. v. Daly,* supra.

4. A claim is wholly void, if it be for a greater sum than is in fact due, when the OVER-CLAIM is made with conscious fraud, on the part of the claimant, *Camden Wks. v. Camden,* 15 Dick. 211; 19 Id. 723; and fraud will be presumed when the claimant must have known that it was an over-claim; and the same result may be reached if the over-claim is attributable to the claimant's gross carelessness. *Camden Wks. v. Camden,* supra. But a claim will be good for the real sum due, when the over-claim is due to excusable inadvertence, or a justifiable doubt as to the legality of the excessive portion of it. *Camden Works v. Camden,* supra; *Garrison v. Borio,* 16 Dick. 236; *Hall Co. v. Jersey City,* 17 Dick. 489; 19 Id. 766.

It is proper for a claimant to include in his notice of claim items for materials supplied to him, although such materialman might also make valid claim upon the fund therefor. *Hazard v. Bd. of Ed.,* 75 Atl. 237.

The wording of the section is very different from the language of § 3 of the Mechanics Lien Act, as it stood prior to the amendatory act of 1910, p. 500, and under which it was held to be fatal to give notice for a sum in excess of the amount that proves to be actually due such claimant. There the words were: "Whenever any masterworkman or contractor shall, upon demand, refuse to pay to any person, etc., the money or wages *due* to him, it shall be the duty of such, etc., to give notice, etc., of the amount *due* to him or them *and so demanded.*" Here there is no requirement that a claimant shall have made demand, and met with refusal, before he can give notice; it is expressly provided that such notice may be given before the claimant's compensation is due to him at all; and it is required that the amount to be stated in the notice shall be the amount *claimed,* and not the amount that is actually *due* or to grow due.

7. When the claimant holds an unmatured note for part of his claim, he sufficiently states "THE AMOUNT OF THE DEMAND after deducting all just credits," by stating that the amount due is a certain sum and that the amount to grow due is a certain sum (viz.: the amount of the note). *Hall v. Jersey City,* supra.

8. It is not necessary that the notice shall use the statutory words, "after deducting all just credits and offsets." *Hall Co. v. Jersey City,* supra.

9. The notice sufficiently states the NAME OF THE PERSON to whom the materials were furnished, when it states the name of the person who contracted with the city and describes the contract so as to identify it. *Hall v. Jersey City,* 17 Dick. 489. See post, note 10.

10. The notice sufficiently states the "TERMS, TIME GIVEN, and conditions of HIS contract," when it gives the name of the city's contractor and describes the contract between him and the city, its filing, etc., so as clearly to identify it, and says that the lien is claimed on the money due and to grow due on that contract. *Hall v. Jersey City,* 17 Dick. 489. This was Vice Chancellor Pitney's view, that *his* contract means the contract of the city's contractor and not that of the claimant. In the Court of Errors and Appeals, however, this view was questioned, and some of the judges there thought that the claimant's contract was the one intended. The question was left unsettled as the claimant in that case furnished the materials upon a fixed scale of prices, but upon orders given from time to time; so that there was no contract entered into in advance of the delivery of the materials, and nothing which could be stated under the statute, if it did refer to the claimant, in the word, *"his."* The opinion, however, cautions careful practitioners to draw such notices, to cover either view.

In the recent case of *National, etc., Co. v. Daly,* 74 Atl. 152, V. Ch. Stevens adopts, as the more reasonable, the view that the contract intended is the claimant's contract.

When the claimant's notice annexes an invoice which gives the dates, kind of materials furnished, and prices with the words, "terms net 30 days, goods f. o. b. New York," it sufficiently states the terms, time given, and conditions of claimant's contract. *National, etc., Co. v. Daly,* supra.

No lien can be claimed for materials which have not, at the date of the notice, been actually used in the improvement, although supplied to the contractor for that purpose. *National, etc., Co. v. Daly,* 74 Atl. 152; *Hazard v. Bd. of Ed.,* 75 Atl. 237; but a statement, that the materials have been supplied on and about a school building that has been completed, sufficiently alleges that they have been actually used in the completion of such building. *National, etc., Co. v. Daly,* supra.

Entry of notices. Lien Book. Scope of Record.

Sec. 3. *And be it enacted,* That the financial officer of said city, town, township or other municipality shall enter the claims in a book kept for that purpose by him, called the "lien book;" such entry shall contain the name and residence of the claimant, the name of the contractor, the amount and date of the filing, and a brief designation of the contract upon which the claim is made.

Action to enforce lien. Limination.

Sec. 4. *And be it enacted,* That no lien provided for in this act shall be binding upon the property therein described, unless an action be commenced within ninety days from the filing of the same,[1] and a notice of pendency of said action be filed with the financial officer of said city, town, township or other municipality.

The act of 1909, p. 260, § 3, says that it amends this section, but it makes no change in it, in fact, beyond inserting a comma after the word, township.

1. The requirement is peremptory. If suit be not begun within ninety days after the claim is filed, the lien is lost. *Roselle Park v. Montgomery,* 60 Atl. 954; *Somers Co. v. Souders,* 4 Rob. 388; 70 Atl. 158; *Hazard v. Bd. of Ed.,* 75 Atl. 237.

When lost by failure to bring suit, the lien cannot be revived by any act of the municipality, *Roselle Park v. Montgomery; Somers Co. v. Souders,* supra.

Neither will a claim be aided by the fact that the solicitor of the municipality has acknowledged service of subpoena, *Hazard v. Bd. of Ed.,* supra.

It is not necessary, however, that each claimant give a separate notice, it is enough that any one of the parties in the suit give actual notice, stating the character of the suit and the names of the parties; and such notice will avail for all who are named in it as parties, although not for any party who is not named in it. *National, etc., Co. v. Daly,* 74 Atl. 152; *Hazard v. Bd. of Ed.,* supra. As said in the Daly case the notice need not be entitled in the cause, and may be by letter, but it must itself give actual notice of each claim that would avail itself of its benefit, and not merely put the municipality upon its enquiry as to the names of the parties claimant.

Accrual of Lien.

Sec. 5. *And be it enacted,* That the lien shall attach from the time of filing thereof[1] to the extent of the liability

of the contractor for the claim preferred upon any funds which may be due or to grow due to said contractor from said city, town, township or other municipality under the contract against which the lien is filed,[2] *provided, however, that the funds due or to grow due to the said contractor from said city, town, township or other municipality may be released and paid to the said contractor by the financial officer of said city, town, township or other municipality upon the filing with such financial officer of a bond in double the sum of all claims filed under the provisions of this act against the said contractor, or the funds due or to grow due to him, conditioned for the payment of such sum or sums as may be decreed to be due from the said contractor under any such claim, which bond shall be approved as to form by the chief law officer of such municipality, and as to sufficiency by the financial officer with whom it is filed.*

This is the section as amended by the act of 1909, p. 260, § 4, which added the proviso which we have italicized.

1. The claimant has no inchoate lien before he files his notice, *Somers Brick Co. v. Souders,* 4 Rob. 388; aff. 70 Atl. 158; his lien arises when he files his claim, not when he furnishes the labor or material. *Somers v. Souders,* post; *Garretson v. Clark,* 57 Atl. 414; *Pierson v. Haddonfield,* 21 Dick. 180.

2. When filed, the claim is a lien on what is then due the contractor and what may thereafter grow due. *Pierson v. Haddonfield,* supra.

"There is no prohibition in the act against anticipated payments, no inchoate lien on the fund, and no provision making the owner who prepays liable to a subsequent claimant. *Somers Brick Co. v. Souders,* 4 Rob. 388; aff. 70 Atl. 158.

A creditor of a sub-contractor can reach the fund only to the extent of the debt then due from the contractor to such sub-contractor. See note 3 to § 1, ante.

Parties complainant in action to enforce lien, or to terminate same.

Sec. 6. *And be it enacted,* That any claimant who has filed the notice mentioned in the second section of this act, may enforce his claim against the said fund therein designated and against the person or persons liable to the debt by a civil action,[1] actions to determine or terminate said liens may be commenced by the contractor or said city, town, township or other municipality in any court of competent juris-

diction.[2] *If in any such action the contractor, or other party defendant, at any time prior to final hearing shall file an affidavit setting forth any matter or thing which would be a valid defense at law on his behalf to any suit wherein the said claimant was plaintiff, but which matter or thing cannot be set up in defense in such action, all further proceedings in such action shall thereupon be stayed until the determination of the said matters or things so set out in such affidavit by a court of law, and, unless the said claimant shall institute a suit at law within thirty days thereafter for the recovery of the amount of the said claim, his bill shall be dismissed with costs. The record of any judgment in any such suit at law, so instituted, may be set up in the said action, and shall be conclusive as to so much of the amount of said lien claim as may have been at issue in the said suit.*

This is the section as amended by the act of 1909, p. 260, § 5, the amendment consists in the addition of the words which we have italicized.

1. A bill to enforce a claim for less than $50 will not be entertained. *Kellaher v. English,* 17 Dick. 675.

The claimant's debt is assignable, and passes the right of lien to the assignee, together with the right to enforce it. *Hall v. Jersey City,* 17 Dick. 489; 19 Id. 766; but the assignment of his claim, by a sub-contractor, does not give the assignee any lien upon the fund, until the necessary notices of claim have been duly filed, *National Fire Proof'g Co. v. Daly,* 74 Atl. 152. It would seem that the assignor must in such a case verify the notices.

An assignment of claim is good from its date, and, as against other claimants, it does not need to be perfected by notice given the owner in order to be operative. *United States Co. v. Newark,* 74 Atl. 192.

A negotiable draft, not payable out of any specific fund, cannot be regarded as an equitable assignment, pro tanto, of any given fund. *Roselle Park v. Montgomery,* 60 Atl. 954.

The suit to enforce the lien given by this act must be brought in the Court of Chancery. *Delafield v. Sayre,* 31 Vroom 449.

A claimant, who is made defendant in a suit brought by another claimant, need not institute a separate suit upon his own claim. *National, etc., Co. v. Daly,* supra.

A claimant, holding an order for his debt, does not waive his rights thereunder by also filing his bill to enforce his lien. *Somers v. Souders,* 70 Atl. 158; reversing s. c., 4 Rob. 388, as to this point.

Taking an assignment from a sub-contractor does not prevent a materialman from also claiming and enforcing his lien for such materials. Neither does the contractor's bankruptcy avoid the lien of claimants. *National, etc., Co. v. Daly,* 74 Atl. 152.

2. There can be no personal judgment given in favor of the contractor and against the municipality, in case the fund exceeds all the claims. *Norton v. Sinkhorn,* 18 Dick. 313; *United States Co. v. Newark,* 66 Atl. 904.

Parties defendant; process; notices of object of suit; answers; determination of priorities.

SEC. 7. *And be it enacted*, That the plaintiff must make all parties who have filed claims, the contractor and the said city, town, township or other municipality, parties defendant,[1] and as to all parties against whom no personal claim is made, the plaintiff may, with the summons, serve a notice stating briefly the object of the action, and that no personal claim is made; but all parties who have filed claims under this act may, by answer in such action,[2] set forth the same, and the court in which the action is brought may decide as to the extent, justice and priority of the claims of all parties to the action.[3]

1. The debt due from the municipality to the contractor is attachable, *Roselle Park v. Montgomery,* 60 Atl. 954; and an attaching creditor should be made a defendant, to cut off his rights.

2. If a claimant hold also an order for his debt, and the other claimants so allege, denying its priority, he may assert its priority in his answer, and have it established as prior, notwithstanding he has not himself, in his own bill, to enforce his lien under his notice, set up such order. *Somers Co. v. Souders,* 70 Atl. 158; reversing s. c., 4 Rob. 388, on this point.

3. See the succeeding section, note 3.

Scope of judgment; Form of same; Execution; Appeal

SEC. 8. *And be it enacted*, That the court in which the action is brought shall determine the validity of the lien,[1] the amount due from the debtor to the contractor under his contract,[2] and from the contractor to the respective claimants,[3] and shall render judgment, directing that the said city, town, township or other municipality shall pay over to the claimants for the work done and the materials furnished in the execution of said contract or contracts, whose claims or liens it shall hold to be valid and just, in the order of their priority as determined by said court to the extent of the sum found due to said claimants from the contractor, so much of said funds or money which may be due from the

said city, town, township or other municipality to the contractor, under his contract, against which the lien is filed, as will satisfy their liens or claims, with interest and costs, to the extent of the amount due from said city, town, township or other municipality to said contractor;[4] the judgments rendered under this act may be enforced by execution and an appeal may be taken therefrom in the same time and manner as in civil actions.

3. The contractor cannot avail himself of any claim by way of SET OFF against any of the lien claimants; but he may and should, set up any right to reduce a claim that he may have, even for unliquidated damages, if resulting from the claimant's failure to perform obligations devolving upon him by the same contract on which such claimant bases his own right. *Norton v. Sinkhorn,* 18 Dick. 313, reversing s. c., 16 Dick. 508, so far as it denied such right or RECOUPMENT, and affirming its denial of the right to exhibit a cross bill to recover such damages.

4. Proceedings to enforce the liens given by this act are proceedings QUASI IN REM and are limited to ascertaining the rights of the parties in respect of the contract price and directing payment thereof accordingly. *Norton v. Sinkhorn,* supra.

The statute contains no provision which authorizes the court to give a personal judgment against the contractor, as a debtor, *Delafield Co. v. Sayre,* 31 Vroom 449; *Garrison v. Borio,* 16 Dick. 236; *Norton v. Sinkhorn,* supra; neither can there be a personal decree in favor of the contractor and against the municipality, in case the fund exceeds all the claims. *Norton v. Sinkhorn,* supra; *United States Co. v. Newark,* 66 Atl. 904.

If the contractor alleges in his answer a RIGHT TO REDUCE A CLAIM because of unliquidated damages sustained through such claimant's default, the proceedings in the Court of Chancery will be stayed to permit such damages to be first ascertained at law. *Norton v. Sinkhorn,* supra.

The court cannot compel the payment of claims, nor determine their ascertainment, until the contract for the improvement is completed. *Pierson v. Haddonfield,* 21 Dick. 180.

If the contractor ABANDON the work and his sureties complete it, the latter are entitled, by subrogation, to so much of the fund as will reimburse them for their necessary outlay in so doing; and their right is superior to the right of claimants who have furnished the contractor work or materials. *Union Stone Co. v. Hudson Co.,* 1 Buch. 657 (V. C. Garrison), following *St. Peter's Church v. Van Note,* 21 Dick. 78; and dissenting from Vice Chancellor Grey's view, in *Pierson v. Haddonfield,* 21 Dick. 180; that the rights of such claimants are superior to those of the sureties in such a case.

When a contract provides that if the contractor abandons the work, the municipality may let a new contract and charge the ex-

pense to the original contractor, the letting of such new contract, it is said, will, of course, cut off the creditors of the original contractor, in respect of any part of the contract price unearned at the time of such abandonment. *Union Stone Co. v. Hudson Co.*, supra; but if the contractor's sureties, upon such abandonment, take up and complete the work, there is no new contract made whereby the creditors of the contractor may be cut off, as to such unearned part of the contract price. *Union Stone Co. v. Hudson Co.*

The right of the claimant is, of course, subject to the superior right of the municipality to charge first, against the fund, the cost of completing the abandoned work. *Somers Co. v. Souders*, 4 Rob. 388; 70 Atl. 158.

Laborers claims preferred. Otherwise priorities as per date of notice filed. Determination of priorities.

Sec. 9. *And be it enacted*, That in case of a number of liens in favor of different persons, their rights and priorities shall be determined as follows: persons standing in equal degrees as co-laborers or persons furnishing materials shall have priority according to the date of the filing of their liens; but laborers shall have a lien prior to other liens, upon filing their notices any time before payments are due and made, when several lien notices are filed for the same demand, the judgment shall provide for the proper payments according to priority, so that under liens filed, double payments shall not be required.

Where there are two claims filed at the same time, and there is not money enough to pay both, they take pro rata. *Wilson v. Dietrich*, 59 Atl. 250.

Consolidation of Actions.

Sec. 10. *And be it enacted*, That when separate actions are commenced, the court in which the first action was brought may upon the application of said city, town, township or other municipality consolidate them.

The proper practice is thereafter, on the application of the municipality, to have the suits of all the claimants consolidated. *Somers Co. v. Souders*, 4 Rob. 388; 70 Atl. 158.

Costs discretionary.

Sec. 11. *And be it enacted,* That costs in all actions shall rest in the discretion of the court and shall be awarded to or against the plaintiff or defendants, or any or either of them, as may be just.

Costs should be given against any party only when, and to the extent that, he has unsuccessfully contested another's claim, or asserted his own. The normal costs of the proceeding should be paid out of the fund. *Hall v. Jersey City,* 19 Dick. 766; Rev. 17 Dick. 489.

Determination no bar to personal action against debtor

Sec. 12. *And be it enacted,* That nothing contained in this act shall be constructed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished, to maintain a personal action to recover such debt against the person liable therefor.

Claimants may obtain personal judgments against the contractor, in proper actions at law, notwithstanding suit has been brought to enforce their right of recourse against the fund. *Delafield Co. v. Sayre,* 31 Vroom 449.

Discharge of lien by certificate; lapse of time without suit; satisfaction of judgment.

Sec. 13. *And be it enacted,* That the lien may be discharged as follows: first, by filing a certificate of the claimant or his successor in interest, duly acknowledged and proved, stating that the lien is discharged; second, by lapse of time, when ninety days have elapsed since the filing of the claim and no action shall have been commenced to enforce the claim; third, by satisfaction of any judgment that may be rendered in actions to foreclose said liens or claims; *fourth, by dismissal of the bill as hereinbefore provided; fifth, by final decree of the Court of Chancery in the action.*

This is the section as amended by the act of 1909, page 260, § 6. The amendment added the words which we have italicized.

Construction of Terms.

Sec. 14. *And be it enacted,* That the term "contractor" as used in this act, shall be construed as meaning the person

with whom the contract with the said city, town, township or other municipality is made, his assigns or legal representatives.

Time of taking effect. Repealer.

Sec. 15. *And be it enacted,* That this act shall take effect immediately; but nothing herein contained shall affect the validity of any claims or liens upon moneys due or to grow due under contracts made by cities, towns, townships or other municipalities in this state prior to its passage; *provided, however, that all the proceedings to enforce any such claims or liens shall be subject to the provisions of this act so far as the same may be applicable; and* all acts and parts of acts inconsistent with the terms of this act are hereby repealed.

This is the section as amended by the act of 1909, p. 260, § 7, by the insertion of the words which we have italicized.

In *Howell Lumber Co. v. New Brunswick,* 75 Atl. 750 (Ch.), it is held that the "proceedings" referred to are the proceedings in court and that a claim due under a contract made prior to the act of 1909, is duly filed, although no bond be filed with it.

CHAPTER IV.

FORMS.

FORMS.

1.—Common form of building contract. § 2.

ARTICLES OF AGREEMENT, Made the first day of May, One Thousand Nine Hundred and Two.

BETWEEN John Carpenter (called hereinafter the owner) of the Village of Hackensack, in the County of Bergen and State of New Jersey, of the First Part;

AND Thomas Romaine (called hereinafter the builder) of the Village of Hackensack, in the County of Bergen and New Jersey, of the Second Part;

WITNESSETH,—The said party of the second part doth hereby for him, his heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part, his executors, administrators or assigns, that he said party of the second part his executors or administrators shall and will for the consideration hereinafter mentioned, on or before the first day of March next well and sufficiently erect and finish the four story brick building to be erected for the said party of the first part on the lands to him belonging, situated on the easterly side of Monroe Street, in the said Village of Hackensack, and known as lot No. 42 on a certain Map entitled, "Map of Hackensack Park" agreeably to the Drawings and Specifications made by Joseph Story, Architect,* and signed by the said parties and hereunto annexed, within the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said Architect,[1] to be testified by a writing, or certificate, under the hand of the said Architect, as hereinafter mentioned, and, also, shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing of all the works of the said Building mentioned in the plans and specifications for the sum of Fifteen Thousand Dollars to be paid as is hereinafter specified.

AND the said party of the first part doth hereby, for him, his heirs, executors and administrators, covenant, promise and agree, to and with the said party of the second part, his executors and administrators, that he the said party of the first part, his executors and administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay or cause to be paid unto the said party of the second part his executors, administrators or assigns, the sum of Ffteen Thousand Dollars, lawful money of the United States of America, in manner following:

Five Thousand Dollars when the foundation of said building is completed:

Five Thousand Dollars when the building is roofed and ready for plastering; and the remaining sum of

Five Thousand Dollars sixty days after the building is entirely completed.

PROVIDED, that in each of the said cases, a certificate shall be produced, signed by the said Architect, to the effect that the work is done in accordance with said Drawings and Specifications, said certificate, however, in no way lessening the total and final responsibility of the Builder; neither shall it exempt the Builder from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the Drawings and Specifications, either in execution or materials.[2]

And it is hereby further agreed by and between the the said parties:

First.—The Specifications and the Drawings are intended to co-operate, so that any works exhibited in the Drawings, and not mentioned in the Specifications, or Vice Versa, are to be executed the same as if they were mentioned in the Specifications and set forth in the Drawings to the true meaning and intent of the said Drawings and Specifications, without any extra charge whatsoever. Copies thereof certified by the Architect to be true copies shall be furnished to the Builder.

Second.—The Builder at his own proper cost and charges, is to provide all manner of materials and labor, scaffolding,

implements, moulds, models and cartage, of every description for the due performance of the several erections.

Third.—Should the Owner at any time during the progress of the said Building request any alterations, deviations, additions or omissions, from the said contract, he shall be at liberty to do so, and the same shall in no way affect or made void the contract, but will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation.[3]

Fourth.—Should the Builder, at any time during the progress of said works, refuse or neglect to supply a sufficieney of materials or workmen, the Owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract.[4]

Fifth.—Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by the said Joseph Story, Architect, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or the works omitted, the same shall be valued by two competent persons—one employed by the Owner, and the other by the Builder—and those two shall have power to name an umpire, whose decision shall be binding on all parties.

Sixth—The Owner shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same.

Seventh.—No alterations or extra work shall be done without a written order from the Owner, approved by the Architect and an express agreement in writing as to the cost.[5]

Eighth.—The Owner will insure the building in the joint names and interest of himself and the Builder against loss or damage by fire, in such sums as may from time to time be agreed upon with the Builder to cover the work and materials used in the building and around the premises, and the policies shall be made payable to Owner and Builder, as their interests may appear. The Builder shall see to it that this insurance is satisfactorily effected.

Ninth.—All work and materials, delivered on the premises to form part of the works, are to be considered the property

of the Owner, and are not to be removed without his consent; but the Builder shall have the right to remove all surplus materials after the completion of the works.

Tenth.—Neither the Builder nor the Architect shall, without the written consent of the Owner, have authority to vary, alter, amend or change this contract, or any of the Plans or Specifications herein referred to.

Eleventh.—Whenever building permits shall be required by any municipality, or be necessary under any law, ordinance or other regulation, to the erection, alteration or repair of any building, the same shall be procured by the Owner.

Twelfth.—And it is further agreed that the said contractor shall file no lien for any labor or material furnished under this contract, and that no sub-contractor, or other person, for any work done, or materials furnished, shall have any right to file any lien for any sum which may be, or become, due to such person, and that the right to file any such lien is hereby expressly waived by and on behalf of the said contractor and every other person aforesaid.[6]

Thirteenth.—The builder before any payment under this contract is demandable will procure at his own cost and expense and tender the releases of any persons who might make claim to have a lien upon the said building and curtilage, or to have a right of recourse to the moneys in the owner's hands due, or to grow due, to the said builder under the terms of this contract for materials or labor furnished for the said building and will also, accompanying said releases, tender his affidavit that the persons executing the same are the only persons who have, or may have, any right of lien against said building, or of recourse against said moneys by reason of work done, or materials furnished for the said building, but this stitpulation is solely for the benefit and protection of the owner, and he shall not be in anywise liable or answerable to anyone whatsoever, nor shall any one be entitled, as against the owner, to assert any right of lien, inchoate or otherwise, upon the moneys due or to grow due under this contract to said builder, by reason of the provisions of this stipulation, or by reason of any act or omission, on said owner's part, pursuant to, or in waiver or disregard of its provisions; neither shall any payment made by said owner to said builder in waiver or disregard of the provisions of this stipulation impair, in anywise, said owner's right to

insist upon a compliance with its requirements by the builder as to any payments thereafter to mature.[7]

Fourteenth.—It is further agreed that the builder shall not, without the assent of the owner, assign this contract, nor the moneys due or to grow due to said builder thereunder; and that all and every of such assignments, if made, shall be null and void at the option of the owner (or better, shall be null and void as to the owner).[8]

Fifteenth.—It is further agreed that if the builder fails to complete the said works by the first day of March next, he shall forfeit, and pay, the sum of twenty dollars for each and every day thereafter during which the said work shall remain incomplete, to be deducted from his compensation hereinbefore agreed upon.[9]

In WITNESS WHEREOF, the said parties to these presents, have hereunto set their hands and seals the day and year above written.

Witness.	THOMAS ROMAINE (Seal).
M. D.	JOHN CARPENTER (Seal).

*The specifications and plans referred to in this contract should be also signed by both parties, and one set of them with a duplicate original of this contract should be filed in the county clerk's office.

If the contract be for an addition or alteration, or for repairs, or for the removal of a building, it will be readily seen how to vary its form accordingly.

So too, this form can be readily varied to meet the case of a contract to do a part only of the work of erecting a building.

1. It is part of the architect's duty to see that things are safe, that the place is taken care of; to see whether the work is going on, and to notify the contractor to proceed and complete his work. *Federal Trust Co. v. Guigues,* 74 Atl. 652.

The architect is not authorized to waive any provision on behalf of the owner. *VanBuskirk v. Bd. of Ed.,* 75 Atl. 909.

2. No action can be maintained unless this certificate has first been obtained; unless it can be shown that it has been fraudulently withheld, or its production waived by the owner. *Byrne v. Sisters, etc.,* 16 Vroom 213; *Chism v. Schipper,* 22 Vroom 1; *Bernz v. Marcus Sayre Co.,* 7 Dick. 275; *Kirtland v. Moore,* 13 Stew. 106; *Welch v. Hubschmidt Co.,* 32 Vroom 57; *Bradner v. Roffsell,* 28 Vroom 412; *Mackinson v. Conlon,* 26 Vroom 564; *Sheyer v. Pinkerton Co.,* 59 Atl. 462; *Steelman v. Ludy,* 72 Atl. 423; *Federal Trust Co. v. Guigues,* 74 Atl. 652.

It also applies to payments for extra work as well as all other

payments for work done pursuant to the contract. *Sheyer v. Pinkerton Co.,* 59 Atl. 462.

The provision is binding on the owner, in respect of claimants, who may give notice under §3, and if the owner pays the contractor, without first obtaining the certificate, when it is not unreasonably, or fraudulently, withheld by the architect, he will be liable to such claimants, as though he had not paid, although the building was in fact completed at the time of such payment. *Daly v. Somers Co.,* 4 Rob. 343; s. c., aff. 1 Buch. 307.

But it seems that when an architect is discharged by the owner, he ceases to be competent, thereafter, to give the certificate which the contract stipulates for; and the claimant is thereby relieved from the obligation to procure it, if the contract makes no provision covering the case. *Federal Trust Co. v. Guigues,* 74 Atl. 652.

The architect's certificate is properly given although there be some slight things still undone when they are so left to aid the further progress of the work and it is customary to consider that the general terms used do not call for them to be fully completed. *Veitch v. Clark,* 1 Rob. 57.

3. Labor and materials furnished under this clause are furnished, *pursuant to the contract,* inasmuch as the contractor is bound to furnish them upon the owner's demand. *Willetts v. Earl,* 24 Vroom 270; *Dunn v. Stokern,* 16 Stew. 401; but when a contract provides that the parties thereto may *agree* to alterations in the building at any time during its construction without altering or invalidating this agreement, such a clause does not entitle the owner to demand, nor bind the contractor to make alterations or additions, and if they are so agreed upon and made, they are not pursuant to the contract, but independent of it. *South End Improvement Co. v. Harden,* 52 Atl. 1127.

4. This clause does not entitle the contractor, or his assignee, to require the owner to complete the work and account for the balance of the contract price after deducting the cost of such completion, when the contractor has abandoned the work before completion. If the assignee offered to complete, and the owner refused to permit him, the assignee might then have an equitable claim against such owner. *Bernz v. Marcus Sayre Co.,* 7 Dick. 275.

If the builder abandon the work, and his sureties complete it, with the owner's assent, the work done, and materials furnished, by them are neither done and furnished for the owner or for the builder, but to relieve themselves, as cheaply as possible from their obligation as sureties; and they are entitled to the unearned portion of the contract price, including a percentage of previously earned payments, retained to secure completion of the work, so far as is necessary to reimburse them their necessary outlay. *St. Peter's Church v. Van Note,* 21 Dick. 78; but the case is otherwise with the builder's sureties, who, upon his insolvency, furnish

him with materials, etc., and thus enable him to complete his contract. *Evans v. Lower*, 1 Rob. 232.

See also § 2, note 2, Abandonment of Contract.

5. No action can be maintained for such alteration (or extra work); unless the builder can produce such written orders or prove that the owner either waived the requirement or fraudulently lured him into doing the work without it. *Sheyer v. Pinkerton Co.*, 59 Atl. 462. See also *VanBuskirk v. Br. of Ed.*, 75 Atl. 909.

The order must be procured before the work is done, there can be no lien for such work done without such order although the architect, after it is done, gives such order. *Federal Trust Co. v. Guigues*, 74 Atl. 652.

6. This stipulation, if the contract is not filed, will not protect the land and building from the lien of mechanics and materialmen, even although the latter be sureties on the builder's bond given to secure the performance of the contract, *Brewing Co. v. Donnelly*, 30 Vroom 48; s. c. 30 Vroom 439; but this is so because the sub-contractor (or other claimant) is not, *ipso facto*, chargeable with knowledge of what is contained in the builder's contract; and where it is shown that he did have notice of such provision, the mere acceptance of employment by him, as such, will bar him from asserting any lien therefor. *Bates, etc., Co. v. Trenton Co.*, 41 Vroom 684; *Stewart, etc., Co. v. Trenton Co.*, 42 Vroom 568.

7. Where a building contract provides that the final payment shall become due on the completion of the work and on the builder's furnishing releases of all liens and claims that might arise in the performance of the contract; the builder must show that before he begun suit he tendered such releases, or else that no such liens or claims then existed. *Turner v. Wells*, 35 Vroom 269; *Titus v. Gunn*, 40 Vroom 410. Such non-existence of liens or claims is shown in a suit by a sub-contractor against the builder, in which it is shown that the builder's contract with the owner was filed with the specifications, and that the owner had settled with such builder without receiving any stop notices and before the sub-contractor's suit was begun. *Turner v. Wells*, 38 Vroom 572.

Such a stipulation in a building contract refers to liens, or claims, arising under the Mechanic's Lien Act. *Turner v. Wells*, supra; *Titus v. Gunn*, supra.

By the terms of this stipulation, the builder's right to demand his compensation cannot mature so long as there are any persons unpaid who might be entitled to give notice under the third section of the Mechanics' Lien Act. According to the rule pronounced in *Binns v. Slingerland* and followed and approved in numerous cases since, the inchoate lien of such persons must, therefore, continue, until all of them have been satisfied. Owners who insist upon making this clause a part of their contract may, therefore, thereby prevent the builder from effectively assigning

any of his compensation, as against such claimants. The stipulation has been drawn so as to prevent, on the other hand, any possible claim that such claimants might have, as against the owner also, an inchoate lien until they were actually paid or had released.

8. When a building contract provides that any assignment by the builder of the moneys due or to grow due to him thereunder shall at the option of the owner be null and void; the owner must exercise such option within a reasonable time after being notified of any such assignment or the right will be lost; if the provision is not, indeed, wholly nugatory as in contravention of the statute; which makes all choses in action assignable (Gen. Sts. 2591, § 340; 1903, p. 537, § 19). *Turner v. Wells,* 35 Vroom 269.

Such stipulation is for the sole benefit of the owner. Other parties have no interest in it, no right to demand its fulfillment and are entitled to no indemnity for its violation. *Burnett v. Jersey City,* 4 Stew. 341; *United States Co. v. Newark,* 74 Atl. 192.

9. A penalty clause is usually good for the owner's actual damage only; but in *Fell v. McManus,* 1 Atl. 747 (Bird, V. C.), it seems to have been considered that an owner would be entitled to the actual penalty, without proof as to what his actual damages might be, although the parties in that case agreed upon an amount to be allowed.

For the rule on this subject see *Monmouth Park Association v. Wallis Works,* 26 Vroom 132 (E. & A.); *Van Buskirk v. Bd. of Ed.,* 75 Atl. 909. If the owner delays the completion the time for completion is thereby pro tanto extended, if the contract so provide. See last case above cited.

2.—Form of stop notice. §§ 3 and 6.

To John Carpenter, Owner:

You are hereby notified, that Thomas Romaine (the Contractor) is justly indebted to me, in the sum of Five Hundred Dollars * for materials furnished, by me to him, and used in the erection of * the four story brick building, erected or being erected on the land owned by you, and situated (describe the land as the building contract describes it if it sufficiently does so; otherwise, describe it according to the fact), pursuant to the written contract, made between you and him, and on file in the Bergen County Clerk's Office; and you are further notified, that I have demanded payment from the said Thomas Romaine of the said sum of money, so due and owing to me as aforesaid, and that he has refused to pay the same or any part thereof; and you are, therefore, required to retain the amount, so due and claimed by me,

out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and, on being satisfied of the correctness of my demand, to pay the same to me.

JONATHAN BAILEY.

Dated September 6, 1902.

*If the claim is for wages, say, in lieu of the words between the asterisks,—for wages due me for work and labor, on his employment, in the erecting and constructing.

If the claim is for materials, as well as for wages, insert the clause last given at the first asterisk.

If the work under contract, is for the alteration, reparation, or removal of a building, the notice should be varied accordingly.

If the amount claimed in this notice exceeds the true amount due, by even a small amount, the notice may be entirely worthless. See § 3, and notes, as to this and other important matters.

If a claimant, not a sub-contractor, has a claim for materials as well as for wages it may be good practice to make a separate demand and notice for each. So if, for any reason, it is doubtful whether all that is claimed is within the remedy of the third section, it might be wise to make one demand and notice for the amount, that is certainly good and a simultaneous, but separate, demand and notice for the rest.

3.—Notice to builder that owner has been served with a stop notice.* § 3.

To Thomas Romaine (Builder):

You are hereby notified that I have been served with a notice, a copy whereof is as follows (here insert a copy of the stop notice which has been served).

JOHN CARPENTER.

Dated September 7, 1902.

*Owners frequently neglect to give the above notice; but, by reference to the statute (§§ 3 and 4), it will be seen that it may very materially add to the owner's protection to give it.

Claimants might find it also to their advantage, to prepare this notice and see that it is signed by the owner, and served, with his approval on the builder; as they would then, in the absence of notice to sue (see form 4, post), be enabled within five days thereafter, to more readily satisfy the owner that their claims were correct.

3a.—Form of declaration in a suit against the owner, on a stop notice. § 3.

New Jersey Supreme Court of the
day of, etc.

Bergen County, ss.: John Carpenter the defendant in this suit was summoned to answer Samuel Andreus the plaintiff therein in an action upon contract and thereupon the said Samuel Andreus, by his attorneys, X. Y., complains for that whereas heretofore, to wit on the, etc. (date of the building contract) at, etc. (venue) the said defendant was then and there the owner of a certain parcel of land and premises, viz.; (describe the land),[1] and being such owner as aforesaid the said defendant then and there made and entered into a written contract with Thomas Romaine, a copy whereof is annexed to this declaration and is hereby referred to and made part hereof;[2]

And the plaintiff avers that afterwards, to wit, on, etc. (the true date) the said contract, and a duplicate thereof, together with the specifications accompanying the same, and a copy and copies thereof, were filed in the office of the Clerk of Bergen County, in which the building mentioned in said contract is situated before any work was done or materials were furnished for the said building:

And the plaintiff further avers that afterwards, to wit, on the day and year last aforesaid, at (venue) the said Thomas Romaine became and was indebted to the plaintiff in a large sum of money, to wit, the sum of one thousand dollars (the exact sum stated in the plaintiff's notice)[3] for materials furnished by the said plaintiff, at the special instance and request of the said Thomas Romaine, and used in the erection of the said building, and in the like sum for materials furnished and for work and labor by the plaintiff done, performed, and bestowed, at the like special instance and request of the said Thomas Romaine, and used in the erecting and constructing of said building, and on the employment by the said Thomas Romaine of the plaintiff as a sub-contractor, journeyman and laborer in that behalf; and being so indebted the said Thomas Romaine in consideration thereof then and there, to wit, at the time and place last aforesaid, undertook and promised to pay the sum of One Thousand Dollars to the plaintiff upon demand:

And the said plaintiff further avers that thereafter, to wit,

at the time and place last aforesaid he demanded the said sum of One Thousand Dollars of the said Thomas Romaine and that the said Thomas Romaine then and there refused to pay the same, or any part thereof to the plaintiff, and thereupon the plaintiff, afterwards, to wit, at the time and place last aforesaid, gave the said defendant notice in writing of said demand and refusal and of the amount due to the plaintiff as aforesaid and so demanded:

And the plaintiff further avers that the said Thomas Romaine hath ever since the time last above mentioned, refused and still doth refuse to pay the said sum of One Thousand dollars or any part thereof to him, the plaintiff; that the said defendant on the said, etc. (the alleged date of the demand), was the owner of the said lands, premises and building, and was satisfied of the correctness of the plaintiff's said demand; of all which matters and things the said defendant had notice, heretofore, to wit, at the time last aforesaid at (venue).

And the plaintiff further avers that the said Thomas Romaine, after the making of the said contract firstly above mentioned, did duly perform all the matters and things therein and thereby required and undertaken by him to be performed, according to the true tenor and effect of said contract,[4] and that at the time aforesaid, when he, the said plaintiff, gave the said defendant notice in writing, as aforesaid, that there was due, the sum of Two Thousand Dollars, and thereafter, and before the beginning of this suit, there became due the further sum of two thousand dollars, from the defendant to the said Thomas Romaine, by reason of the said performance, by the said Thomas Romaine of the said contract first above mentioned.

By means whereof, and by force of the statute in such case made and provided, the said defendant, John Carpenter, became and was indebted to the said plaintiff in the said sum of Two Thousand Dollars, to wit, on the day and year, and at the place aforesaid, and being so indebted he, the said defendant, afterwards, to wit, on the day and year, and at the place last aforesaid, in consideration thereof undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of Two Thousand Dollars, when he, the said defendant, John Carpenter, should be there unto afterwards requested.

(Add the common counts, as in assumpsit, and conclude with common breach. Annex bill of particulars and copy of contract.)

1. This allegation may not be necessary, but see the notes under § 3 of the statute, as to what the plaintiff must show, and generally as to the other allegations necessary.

2. If preferred, set out the contract in the body of the declaration, according to its legal effect; in which case it will not be necessary to annex a copy thereof, and this reference to it as so annexed will be omitted. It does not seem necessary to vary the declaration, accordingly as this contract is, or is not, under seal; and it is believed that, if it be under seal, no profert is necessary.

3. This is important, as it may be considered a fatal variance if the sum here alleged be other than the sum specified in the notice served by the plaintiff upon the owner.

4. This general averment of performance of conditions precedent is of great importance.

4.—Notice from builder to claimant, under stop notice, to establish his claim by judgment. § 4.

To Jonathan Bailey (Claimant):

You are hereby notified that I dispute your claim of Five Hundred Dollars whereof you have served the following notice upon John Carpenter (owner),—

(Here insert a copy of the stop notice which has been served.)

You are, therefore, requested to establish your said claim by judgment.

THOMAS ROMAINE (Builder).

Dated September 10, 1902.*

*This notice must be served on the claimant within five days after the builder himself receives notice of the claim from the owner. The failure to give this notice in time will protect the owner in paying the claim, if he is otherwise satisfied of its correctness.

To make this notice effectual, it is also necessary for the builder to prepare and serve on the owner a notice such as is shown in form No. 5.

5.—Notice from builder to owner that a notice to establish his claim by judgment has been served on claimant. § 4.

To John Carpenter (Owner):

Take notice that I have this day served on Jonathan Bailey, claimant, the following notice:

(Here insert a copy of the notice served on the claimant. See form 4, supra.)

THOMAS ROMAINE (Builder).

Dated September 11, 1902.

6.—Owner's consent to erection of building. § 7.

Whereas it is desired by George Duane, to erect a barn on premises occupied by him, as my tenant, and situated in the Borough of Rutherford, in the County of Bergen, and State of New Jersey, and more particularly described as follows, viz:

(Describe the lands as would be necessary in any conveyance of them.)

And whereas the said George Duane has procured Thomas Romaine to agree to furnish all the labor and materials necessary for the erection and construction of said barn and to complete and finish the erection and construction thereof, on condition that I give my consent, to the erection of said barn on said premises, of which I am the owner, so that my said lands may, if necessary, be subjected to a lien for the erection and construction of said barn:

Now, therefore, this instrument witnesses that I do give my consent to the erection and construction of the said barn on my said land, accordingly.

In witness whereof, I have hereto set my hand and seal this first day of May, in the year Nineteen Hundred and Two.*

JONATHAN CARPENTER (Seal).

(If it is desired to record such a consent, add an acknowledgment in the usual form.)

*An owner is most unlikely to give such a consent; but under some circumstances he might do so, on taking from his tenant sufficient security; and the foregoing form will, it is believed, answer the requirements of the statute.

7.—Married woman's dissent.* § 13.

To whom it may concern:

Take notice that I, Mary Ann Carpenter, wife of John Carpenter of, etc., am the owner of the following described lands, viz.:

(Here describe the lands as carefully as would be necessary in a conveyance of them.)

That it has come to my knowledge that one Thomas Romaine (the builder), or some other person or persons, are about to erect (here specify the building or buildings) on my said lands;

(Or about to repair the dwelling house and barn on my said lands;)

That I do not consent to the erection of such buildings on my said land;

(Or that I do not consent to the repairing of such buildings on my said land;)

And that the same is being done against my wishes and consent.

In witness whereof, I have signed these presents, this first day of June, in the year Nineteen Hundred and Two.

MARY ANN CARPENTER.

*This paper when signed must be filed in the office of the clerk of the county where the lands lie.

8.—Lien claim, by contractor against owner, for erecting a building. § 16.

Bergen County Clerk's Office.

Thomas Romaine, Builder,
v.
John Carpenter, Owner.
} Lien Claim.

Be it known, that Thomas Romaine, of the Village of Hackensack, etc., claims a lien upon the building and lands hereinafter described, pursuant to the statute, in such case made and provided, for a debt contracted and owing to him for labor performed and materials furnished for the erection[1] and construction of said building; and, therefore, shows.

First—The said building is a four-story brick building on

a lot or curtilage upon which this lien is claimed, and which is situated in the village of Hackensack, in the county of Bergen, and State of New Jersey, and is more particularly described as follows, viz.:

(Here describe the land as carefully as would be necessary in a conveyance).

Second—The name of the owner of the land and of the estate therein on which the lien is claimed is John Carpenter.[2]

Third.—The name of the person who contracted the debt and for whom and at whose request the labor was performed and the materials furnished for which such lien is claimed is the said John Carpenter.

Fourth.—The following is a bill of particulars, exhibiting the amount and kind of labor performed and of materials furnished, and the price at which, and times when, the same was performed and furnished, and giving credit for all the payments made thereupon and deductions that ought to be made therefrom and exhibiting the balance justly due to the said Thomas Romaine, claimant, from the said John Carpenter, viz.:

John Carpenter,
To Thomas Romaine, Dr.

To furnishing, from the first day of May, 1902, to the third day of February, 1903, all the labor and materials necessary to sufficiently erect and finish the four-story brick building above mentioned, pursuant to contract, at the agreed price of	$15,000

CR.

July 15, By Cash on Account	$5,000	
November 29, By Cash on Account	2,500	
December 23, By Cash on Account	2,500	
Total Credits		10,000
Balance Justly Due Claimant		$5,000

Five thousand dollars, with interest, from April 4, 1902, as per contract.

All the above labor was performed and materials furnished between the first day of May, Nineteen Hundred and Two,

and the third day of February, Nineteen Hundred and three, which said last mentioned date is the date of the last work done and materials furnished for which such debt is due.[3]

THOMAS ROMAINE.

1. If the claim is for addition, alteration or repair, vary the language accordingly.

2. The nature of the owner's estate does not need to be stated, and had better not be attempted.

3. This date should correspond with the bill of particulars and be stated with accuracy.

State of New Jersey, }
County of Bergen, } *ss.:*

Thomas Romaine, of full age, being duly sworn on his oath, says that he is the claimant named in the foregoing claim; that the bill of particulars and statements therein set forth, shown in said claim, are true; that the same is for labor done and materials furnished in the erection of the building in such claim described, at the times therein specified; and that the amount as claimed therein is justly due and owing, from the said John Carpenter to said claimant.

THOMAS ROMAINE.

Sworn and subscribed this sixteenth
day of April, A. D. Nineteen
Hundred and Three.
J. A. K., etc.

ENDORSEMENT.

Bergen County Clerk's Office.

Thomas Romaine,
Builder,
v.
John Carpenter,
Owner. } Lien Claim.

Summons was issued on the within claim this day of , 1903, at the suit of Thomas Romaine, claimant

against John Carpenter, owner and..... mortgagees.

J. R. R., Clerk.

9.—Lien claim, by laborer or material man, against owner, as builder and owner, for erecting a building. § 16.

(The lien claim, in this instance, should style the owner as builder and owner; otherwise it will be in the same form as is given above in Form No. 8, with the exception of the bill of particulars, which, as the claim is not for a contract job, must specify the amount and kind of labor or materials, and the prices at which, and times when, the same were done and furnished. The following may serve as a guide):

John Carpenter,
To Thomas Romaine, Dr.

1902.
September 2, To 200 ft. of pine flooring, at $20 per M $40
September 13, To 7 days' labor of three men in laying floor, September 6 to September 13, at $3 per man.. 63

Total $103

Balance justly due claimant, One Hundred and Three dollars, etc.

10.—Lien claim, by laborer or material man against different persons, as builder and owner, for erecting a building. § 16.

Bergen County Clerk's Office.

Charles Black
v.
Thomas Romaine, builder.
John Carpenter, owner.
} Lien Claim.

Be it known that Charles Black of the Village, etc. (proceed as in Form No. 8, supra, naming Thomas Romaine as builder, in lieu of John Carpenter, in the third clause; and Thomas Romaine as debtor, in lieu of John Carpenter in the fourth clause, in the bill of particulars, and in the affidavit.

The bill of particulars also must comply with the directions given in Form No. 9, supra.)

11.—Lien claim, for erecting one building and for alteration and repairs to another, on the same curtilage. § 16

Bergen County Clerk's Office.

Charlse Black.
v.
Thomas Romaine, builder.
John Carpenter, owner.
} Lien Claim.

Be it known that Charles Black of the Village, etc., claims a lien upon the buildings and lands hereinafter described, pursuant to the statute in such case made and provided, for a debt contracted and owing to him for labor performed and materials furnished for the erection and construction, as well as for the alteration and repair of, and addition to, the said buildings, and, therefore, he shows,

First.—The said buildings are a two-story frame dwelling house, and a frame barn and outhouse on a lot or curtilage, etc. (proceed as in Form No. 8, with such changes as are necessary, in regard to the builder and debtor, and the bill of particulars, as is directed in Form No. 10. And note further, that the bill of particulars should separate the claim for alterations and repairs from the claim for other matter. See Sec. 16, note 6. The following may serve as a guide):

Thomas Romaine
To Charles Black, Dr.

For alterations and repairs on the barn above mentioned, viz.:

1902.

May 10, To 3 days' work, shingling roof of barn, May 8-10, 3 men, at $2.50 per day each.....	$22.50
May 17, To 6 days' work, altering stalls in barn, May 12-17, 3 men, at $2.50 per day each.....	45.00
Total for alterations and repairs.....	$67.50

For erection and construction of the dwelling house above mentioned:

1902.

May 31, To 12 days' work laying floors in said house, May 19-31, 3 men, at $2.50 per day each,	$90.00
June 7, To 6 days' work of 3 men hanging doors, June 2-7, at $2.50 each.....	45.00
Total for erection and construction.....	$135.00

Balance justly due claimant, in all, Two Hundred and Two Dollars and Fifty Cents, etc.[1]

(Conclude as in Form No. 8 and add verification.)

1. If the claim for alterations and repairs does not constitute one entire debt with that for erection and construction, the statement of the date of the last work done should be double. It is possible that, in such case, there may be two lien claims filed, one for the alterations, the other for erection.

12.—Lien claim for erection of several houses with apportionment. § 22.

Bergen County Clerk's Office.

Samuel Andreus
v.
Thomas Romain, Builder,
John Carpenter, Owner.
} Lien Claim.

Be it known that Samuel Andreus, of the Village, etc., claims a lien upon the buildings and lands hereinafter described, pursuant to the statute in such case made and provided, for a debt contracted and owing to him for labor performed and materials furnished for the erection and construction of said buildings, and therefore, shows,

First.—The said buildings are five frame dwelling houses on a lot or curtilage situated, (here describe the whole curtilage, and then proceed) and each of the said buildings and the lot or curtilage whereon it is erected and upon which this lien is claimed may be described, as follows, viz.:

The first building is a frame dwelling house on a lot or curtilage situated, etc. (here described the particular curtilage of that particular house).

The second building is (proceed as before, and so on until each building and its curtilage is described).

Second.—The name of the owner of all the aforesaid lands and of the estate therein on which the lien is claimed is John Carpenter.

Third.—The name of the person who contracted the debt and at whose request the labor was performed and the materials furnished for which such lien is claimed is the said Thomas Romaine.

Fourth.—The following is a bill of particulars, exhibiting

the amount and kind of labor performed and of materials furnished, and the price at which, and times when, the same was performed and furnished, and giving credit for all the payments made thereon and deductions that ought to be made therefrom, and exhibiting the balance justly due to the said Samuel Andreus, claimant, from the said John Carpenter, viz.:

(Set out bill of particulars, as in other cases, for all the labor and materials in one account, and showing the balance justly due, and then proceed.)

And the said Samuel Andreus, claimant, doth hereby divide and apportion the same among the said buildings in proportion to the value of the materials furnished to, and the labor performed for each of said buildings and doth state the amount so apportioned to each such building, as follows, viz.:

To the first building, and its lot or curtilage above described, the sum of dollars (and so in each other case).[1]

All the above labor was performed and materials furnished, etc. (concluding, and adding verification, as in Form No. 8).

1. It is not believed that the statute requires that the claimant shall set out in his lien claim a detailed statement of the apportionment item by item; or that even in his proof, in an action to enforce his claim, he will be bound to show the precise amount of material or labor that, from day to day, was bestowed upon each building. There is no harm, however, in making as specific a statement as may be possible, in the lien claim.

13.—Agreement to extend time of suit. § 18.

In the matter of the lien claim filed in the Bergen County Clerk's Office by Thomas Romaine, claimant against John Carpenter, builder and owner, for a debt of Five Thousand Dollars, it is hereby agreed that the time, in which such lien may be enforced by summons, be extended for the further period of four months after the expiration of the time limited by the statute therefor.

Dated, etc.

JOHN CARPENTER, Owner.
THOMAS ROMAINE, Claimant.

14.—Notice to sue on lien claim.* § 18.

Bergen County Clerk's Office.

Thomas Romaine, Claimant,
v.
John Carpenter, Builder and Owner. } Lien Claim.

To Thomas Romaine, Claimant:

You are hereby required to commence suit to enforce the lien claim filed by you in the Bergen County Clerk's office, for an alleged debt of Five Thousand Dollars, and entitled as above, within thirty days from the service of this notice upon you.

JOHN CARPENTER, Owner.

Dated, etc.

*See Form No. 30, for affidavit of service of this notice, to be filed in order to discharge lien on failure of claimant to sue.

15.—Form of summons. § 23.

County of Bergen, ss.:

(Seal.)

The State of New Jersey to the Sheriff of Our County of Bergen. Greeting:

Summon Thomas Romaine, builder, and John Carpenter, owner, and George L. Mott, mortgagee, to appear before the Circuit Court in and for the County of Bergen, at Hackensack, in the said County, on ..... the.....day of.....that the said Thomas Romaine, John Carpenter and George L. Mott, may each answer unto Samuel Andreus, claimant, in an action upon contract, to the damage of the said Samuel Andreus, the sum of..... dollars, as is said, for which the said Samuel Andreus claims a building lien on certain buildings and lands of the said John Carpenter, upon which the said George L. Mott holds a mortgage of record, and which are described as follows (describe the building and lands as in the lien claim on file).

Witness Jonathan Dixon, Judge of said Circuit Court at Hackensack, in said County, this day of, etc.

J. R. R., Clerk.

X., Y., Attorney.

16.—Service of summons. Forms of returns.[1] § 23.

PERSONAL SERVICE. Duly served the within summons on the defendant, A. B., this third day of June, 1902.

C. R. S., Sheriff.

The above return seems to be all that is necessary, where the defendant is a resident of this state, whether he is served personally or by leaving a copy at his residence; since either of those modes of service are due service of process on such a defendant, in order to warrant a general judgment against him, in personam, or a special judgment against his lands in this state; and in neither case is any affidavit of such service necessary.

A valid judgment in personam against a defendant builder, not resident or found within this state, is, of course, impossible, since the decision in *Pennoyer v. Neff*, 95 U. S. 714; but a special judgment against the lands of such a defendant owner will be warranted by a compliance with the statutory requirements, as to the service of process in such a case. See *Smith v. Colloty*, 40 Vroom 365.

What the proper practice, in such case, is, is by no means so free from doubt as could be wished. There are several cases to consider, viz:

(a) Where such defendant's residence is known and the copy of the cummons is

(1) served upon him out of the state in person; or

(2) left at his residence out of the state; or

(3) mailed to his nearest post office address.

In cases (a), (1) and (2), the statute is plain, that the copy must be affixed to the building, and the copy served or left, all at least ten days before the return day of the summons.

In case (a) (3), it is far from certain, but it is sufficient, perhaps, if the copy is affixed to the building, and the copy mailed to the defendant, at least ten days before the return day; but

(b.) Where such defendant's residence out of the state is unknown, and the copy of the summons must be affixed to the building and also published for four weeks, once in each week, the statute leaves us at a loss to say when these things should be done, with reference to the return day of the summons. Perhaps the safe course is, in such case to publish for five weeks; to have the fourth publication at least ten days before the return day; and to have the copy affixed to the building at least four weeks before the return day.

The statute indicates that it is not necessary that the acts, which constitute service upon a non-resident defendant, should be performed by the sheriff, or other like officer; but it is apprehended that if they are performed by such officer, or so far as they are performed by him, in any case, he should make special return accordingly, by affidavit. An attempt, to indicate the points that should be covered, is made in the following forms of affidavits and the appended remarks.

ACTUAL SERVICE. NON-RESIDENT, WHOSE RESIDENCE IS KNOWN.

State of New Jersey, }
County of Bergen, } *ss.:*

C. R. S., Sheriff*

of the County of Bergen, being duly sworn on his oath says, that the within mentioned defendant, C. D., is not a resident of this State, and resides at, etc., in the City of Albany, in the State of New York, as deponent is informed and believes;[1] that the said defendant cannot be found in this State, and that deponent therefore served the within summons on him, by affixing a copy thereof on the building, within mentioned, on the second day of June, Nineteen Hundred and Two, being ten days before the return of said summons, and also on the same day serving a copy thereof on such defendant personally (or, by leaving a copy thereof at the said residence of the said defendant).

Jurat. C. R. S., Sheriff.

*This affidavit may be made by a person other than the sheriff.

1. It is advisable for this affidavit to state specifically where the residence is; that it is known to be defendant's residence; and what the sources of such knowledge are. Where such sources are the statements of others their affidavits also should be annexed.

LEGAL SERVICE. NON-RESIDENT DEFENDANT, WHOSE RESIDENCE IS KNOWN.

State of New Jersey, }
County of Bergen, } *ss.:*

C. R. S., Sheriff*

of the County of Bergen, being duly sworn, on his oath, says, that the within mentioned defendant, C. D., is not a resident of this State, but resides at, etc., in the City of Albany, in the State of New York, as deponent is informed and believes;[1] that the said defendant cannot be found in this State, and that deponent therefore served the within summons on him, by affixing a copy thereof upon the building, within mentioned, on the second day of June, Nineteen Hundred and Two, being more than four weeks before the return day of said summons, and also on the same day sending a copy thereof, by mail. to the said defendant, directed to him

at the post office address nearest his said residence, and with the postage prepaid thereon.

Jurat. C. R. S., Sheriff.

*This affidavit may be made by a person other than the sheriff.

1. See note 1 to the preceding form.

LEGAL SERVICE. NON-RESIDENT DEFENDANT, RESIDENCE UNKNOWN.

State of New Jersey, }
County of Bergen, } *ss.:*

C. R. S., Sheriff* of the County of Bergen, being duly sworn, on his oath, says, that the within mentioned defendant, C. D., is not a resident of this State, as deponent is informed, and believes;[1] that his residence and post office address is unknown, that the said defendant cannot be found, in this State, and that deponent therefore served the within summons on him, by affixing a copy thereof to the building within mentioned, on the second day, etc., being more than four weeks before the return day of said summons, and also by inserting a copy thereof for four weeks, once in each week, in , a newspaper of this State, published and circulating in the County of Bergen, where the said building is situated.

Jurat. C. R. S., Sheriff.

*This affidavit may be made by a person other than the sheriff.

1. Annex any other affidavits that will show the fact of such non-residence.

It is advisable, if not necessary, that an affidavit should also be attached, in this case, to show that due but fruitless inquiry has been made for the residence of such owner.

This affidavit must, also, be accompanied by the following affidavit:

State of New Jersey, }
County of Bergen, } *ss.:*

A. B., of full age, being duly sworn, on his oath, says; that he is the editor (or, as the case may be) of the , a newspaper printed and circulated at , in the County of Bergen, and that the copy of a

summons hereto annexed was inserted and published in the said newspaper, for four weeks successively, once in each week, commencing on the 6th day of June A. D. Nineteen Hundred and Two, namely on the 6th, 13th, 20th and 27th days of said month of June.

Jurat. A. B.

17.—Form of declaration, on common counts.[1] § 24.

Bergen County Circuit Court,
of the day of
in the year

Bergen County, *ss.:*

Thomas Romaine, builder, John Carpenter, owner, and George L. Mott, mortgagee, the defendants, in this suit, were summoned to answer unto Samuel Andreus, the plaintiff herein, in an action upon contract, the summons having been duly served, by the sheriff of the County of Bergen, on the said Thomas Romaine, John Carpenter and George L. Mott; the said George L. Mott being made a party defendant, because he holds a mortgage of record against the property affected by the claim, to enforce which, this suit is brought, which would be cut off by a sale, under such claim; whereupon the said Samuel Andreus, by X. Y., his attorney, complains that for whereas the said defendant, Thomas Romaine, heretofore, to wit, on the, etc. (make the date a day or two before the lien claim was filed), at, etc. (venue), was indebted to the plaintiff in the sum of (double the debt) dollars for the work and labor, care and diligence of the said plaintiff, by the said plaintiff before that time done, performed and bestowed for the said defendant, and at his special instance and request, and also for divers materials and other necessary things by the said plaintiff before that time found, provided, used and applied in and about that work and labor for the said defendant, and at his special instance and request; and in the further sum of (same as before) dollars, for goods, wares and merchandise, sold and delivered by said plaintiff to the said defendant, Thomas Romaine, at his special instance and request; and in the like sum of money for money lent by the plaintiff to the said defendant, Thomas Romaine, at his special instance and request; and in the like sum of money for interest

due from the said defendant, Thomas Romaine, to the plaintiff, for moneys before then lent by the plaintiff to the said defendant at his special instance and request, and at the like instance, and request foreborne by the plaintiff for a long time then elapsed; and in the like sum of money, for money found to be due from the said defendant, Thomas Romaine, to the plaintiff, on an account then and there stated between them; and, being so indebted, he, the said defendant, Thomas Romaine, in consideration thereof, afterwards, to wit, on the day and year last aforesaid at (venue) undertook and promised to pay the said several sums of money to the plaintiff, on request, yet the said defendant, Thomas Romaine, has disregarded his promise and has not paid any of the said moneys or any part thereof, to the plaintiff's damage dollars. And therefore he brings his suit, etc.

And the said plaintiff avers, and in fact says, that the said debt is, by virtue of the provisions of an act of the Legislature, entitlded, "An act to secure to mechanics and others payment for their labor and materials in erecting any building," approved June 14, 1898, and the supplements thereto, a lien on a certain building and curtilage described as follows (describe building and curtilage as in lien claim):

And the plaintiff further avers that the said defendant, George L. Mott, holds a mortgage (describe the mortgage by the parties thereto, its date of record, and the amount secured by it, and also, if such be the case, state its assignment to the defendant; and then proceed) which said mortgage purports to be an encumbrance upon the lands and buildings above mentioned and by virtue of which the said George L. Mott, claims to hold a lien thereon, but the plaintiff avers that the lien of the debt so due to the plaintiff, as aforesaid, is paramount to the lien of said mortgage, upon the said land and building.

X. Y.,
Attorney of the Plaintiff.

1. If the indebtedness is based upon an express contract, not under seal, a special count may be inserted, if desired, before the common counts.

If the express contract be under seal, the declaration must be framed as in debt and not in assumpsit, of course. It it not wise to omit a special count upon an express contract; and it is important, in such a count, when it is used, to aver generally the per-

formance of all conditions precedent. See *Dimick v. Metropolitan Ins. Co.*, 38 Vroom 367; *Stewart Co. v. Trenton Co.*, 42 Vroom 568.

In a proper case, there should also be a quantum meruit count.

The following is a bill of particulars of the work and labor performed and materials furnished for the said defendant, Thomas Romaine, by the said plaintiff, and for which this action is brought (here set out the bill of particulars as stated in the lien claim).

18.—Declaration by contractor, on a sealed contract.[1] § 24.

Bergen County Circuit Court of the day of in the year Nineteen Hundred and three.

Bergen County, *ss.:*

John Carpenter, builder and owner, and George L. Mott, mortgagee, the defendants in this suit were summoned to answer unto Thomas Romaine, the plaintiff herein, in an action upon contract, the summons having been duly served by the sheriff of the county of Bergen upon each of the said defendants, and the said George L. Mott being made a party defendant because he holds a mortgage of record against the property affected by the claim to enforce which this suit, is brought, which would be cut off by a sale under said claim; and thereupon the plaintiff, by his attorneys, X. Y., complains of the said John Carpenter that he render to the plaintiff the sum of Ten Thousand Dollars (double the amount of the real debt, see note 2, below) which he owes and unjustly detains from him: for that whereas heretofore, to wit, on, etc. (date of contract) at, etc. (venue), by a certain indenture then and there made between the said plaintiff, of the one part, and the said defendant, John Carpenter, of the other part, which said indenture, sealed with the seal of the said defendant, the said plaintiff now brings here into court, and a copy whereof is hereto annexed and referred to and made part of this declaration, the said defendant, J. C., did, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said plaintiff, his executors, administrators, and assigns, that if he, the said plaintiff, would well and sufficiently erect and finish a certain

building in said indenture mentioned, then he the said defendant, J. C., his heirs, executors, and administrators, or some or one of them, should and would well and truly pay or cause to be paid unto the plaintiff the sum of Fifteen Thousand Dollars in the manner and at the times, mentioned and appointed for the payment thereof in and by the said indenture; and although the plaintiff thereafter, viz.: on the, etc. (date of completion of building) at, etc. (venue) did well and sufficiently erect and finish the said building and did fully perform all the matters and things by him to be performed according to the tenor and effect of the said indenture; nevertheless the said defendant, J. C., did not nor would well and truly pay or cause to be paid unto the said plaintiff the said sum of Fifteen Thousand Dollars in the manner and at the time mentioned and appointed for the payment thereof, as aforesaid, but therein failed and made default, and there is now due and owing from the said defendant, J. C., to the said plaintiff for and on account of the said sum of Fifteen Thousand Dollars, a large sum of money, to wit, the sum of Five Thousand Dollars (the true debt without interest) which said sum of Five Thousand Dollars the said defendant, J. C., on the, etc., (make the date just previous to the date when the lien claim was filed) at, etc. (venue) agreed to pay unto the plaintiff when thereunto afterwards requested; whereby an action had accrued to the said plaintiff to demand and have of and from the said defendant, J. C., the said sum of Five Thousand Dollars, parcel of the said sum of money above demanded (that is, first above demanded).

And whereas also the said defendant, J. C., afterwards, to wit, on the date last above mentioned at, etc. (venue), was indebted to the said plaintiff in the sum of Five Thousand Dollars for the work and labor, care and diligence of the plaintiff before that time done, performed and bestowed for the said defendant, J. C., and at his special instance and request, and also for divers materials and other necessary things, by the plaintiff before that time found and provided in and about that work and labor for the defendant, J. C., and at his like special interest and request, and to be paid by the said defendant to the said plaintiff when he, the said defendant should be thereunto afterwards requested:

And in the like sum of money for goods, wares, and mer-

chandise sold and delivered to the said defendant, J. C., and at his special instance and request, by the said plaintiff, and to be paid by the said defendant to the said plaintiff when he the said defendant should be there afterwards requested.

And in the like sum of money for money lent by the plaintiff to the said defendant, J. C., at his special instance and request, and to be paid by the said defendant to the said plaintiff when he, the said defendant, should be thereunto afterwards requested:

And in the like sum of money for money paid, laid out, and expended by the plaintiff for the said defendant, J. C., and at his special instance and request to be paid by the said defendant to the said plaintiff when he, the said defendant should be thereunto afterwards requested:

And in the like sum of money for money had and received by the defendant, J. C., to the use of the plaintiff, and to be paid by the said defendant to the said plaintiff when he, the said defendant should be thereunto afterwards requested.

And in the like sum of money for interest due from the said defendant, J. C., to the plaintiff for moneys before then lent by the plaintiff to the defendant, J. C., at his special instance and request, foreborne by the plaintiff for a long time then elapsed, and to be paid by the said defendant to the said plaintiff when he, the said defendant should be thereunto afterwards requested:

And in the like sum of money, for money found to be due from the said defendant, J. C., to the said plaintiff on an account then and there stated between them, and to be paid by the said defendant to the said plaintiff when he, the said defendant, should be thereunto afterwards requested:

Whereby and by reason of the said last mentioned sums of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said defendant, J. C., the sum of Ten Thousand Dollars first above demanded.

Yet the said defendant, J. C., although often requested so to do, has not as yet paid the said sum of Ten Thousand Dollars, above demanded or any part thereof, to the said plaintiff, but to do this hath hitherto refused and still doth refuse to the damage of the plaintiff of One Thousand Dollars,[3] and therefore he brings his suit.

(Add averment that debt is a lien and averment as to mortgagee as in Form 17, supra; and annex bill of particulars and copy of contract.)

1. This form has been drawn to conform to the contract set out in form No. 1; and the lien claim as given in form No. 8.

In a case, such as the one so supposed, the declaration must be in debt because the contract is sealed. The special count could, however, be dispensed with; as the declaration would be good if only the common counts were used; and not all of them need to be used. It is not wise, however, to omit a special count. See note to form No. 17.

2. This amount should be the aggregate of all the sums mentioned in the different counts; but an arbitrary amount may be taken instead; and, as the summons will lay damages at double the real debt demanded, that sum may be taken.

3. This amount may be any sum less than the aggregate demanded. It should be enough to cover the interest to which the plaintiff may be entitled.

19.—Pleas by owner. § 24.

Bergen County Circuit Court.

Samuel Andreus
v.
Thomas Romaine et al. } On Contract.

And the said defendant, John Carpenter, by X. Y., his attorneys, comes and defends the wrong and injury when, etc., and says that the said Thomas Romaine, builder, did not undertake nor promise, in manner and form, as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country:

And for a further plea in this behalf, by leave of the court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff ought not further to have or maintain his aforesaid action thereof against him and against said building and lands in the declaration above mentioned and described; because he says that said building and lands are not liable to the said supposed debt in manner and form as the plaintiff hath above thereof com-

plained against him, and of this he puts himself upon the country:

(Add any other plea which the builder might have.)

(Signature of Attorney.)

VERIFICATION. *Pr. Act. § 114.

State of New Jersey, }
County of Bergen, } *ss.*:

John Carpenter, of full age, being duly sworn on his oath according to law says that he is the above named defendant and that the foregoing plea is not intended for the purpose of delay and that affiant verily believes that he, the said defendant, hath a just and legal defense to said action on the merits of the case.

(Jurat.) (Signature.)

*In the absence of the defendant, this affidavit may be made by the defendant's attorney or agent, Pr. Act, § 114; and can be readily varied in such case, accordingly.

20.—Pleas by mortgagee. § 24.

(The mortgagee may have the same pleas that the owner may have, and the following plea in addition.)

And for a further plea in this behalf, here by like leave of the court for that purpose had and obtained, etc., the said defendant, George L. Mott, says that the plaintiff (actio non, as before), because he says, that the pretended lien claim of the said plaintiff, whereof mention is above in his declaration made, is not paramount, but is subject to the lien of the said defendant's mortgage, above in said declaration mentioned; and of this he puts himself upon the contrary.

(Signature of Attorney.)

(Add verification.)

21.—Rule for judgment by default. § 24.

(Title of cause.)

The summons in the above stated cause having been duly served on the defendant, Thomas Romaine, builder * and on the other defendants, J. C. etc., in the manner and form required by law, and the plaintiff having filed his declaration

within the time limited by law for filing the same, and none of the said defendants having filed any plea or demurrer, or entered any rule for a writ of inquiry or for assessment of damages in open court within the time required by law therefor, nor at any other time, it is, therefore, on this day of , in the year , ordered that judgment interlocutory by default be entered in favor of said plaintiff and against said defendants (naming all of them). And the clerk of this court having this day duly assessed the damages of the said plaintiff at the sum of dollars.

It is, therefore, on the day and year aforesaid, further ordered that judgment final for the said sum of dollars damages, with costs to be taxed, be entered in favor of the plaintiff generally * against the said defendant, Thomas Romaine, builder (or, builder and owner, if that be the fact), and specially to be made of the lands and buildings in said declaration described.

(If there be a mortgagee defendant, add—)

And it is further adjudged that the lien claim of the said plaintiff is prior to the lien of the said mortgage of the said defendant, George L. Mott (or, vice versa, as the case may be).

Rule entered, etc.

*If the summons is not served upon the builder by "actual service" within the jurisdiction, and he has not appeared generally and submitted to the jurisdiction, there can be no general judgment against the builder and the rule, in that case, must be varied accordingly.

22.—Rule for judgment on verdict.* § 24.

Bergen County Circuit Court.

(Title of Cause.)

The issues joined in this cause having, at the current term of this court, been regularly tried by a jury who, after retiring to consider of their verdict, come again into court and say that as to the issue joined, on the first plea by each of the said defendants pleaded, they find that the said Thomas Romaine did promise in manner and form as the plaintiff hath within in his said declaration complained against him and they assess the damages of the said Samuel Andreus on occasion of the non performance of said promise,

over and above his costs and charges, etc., to dollars; and as to the issue joined on the second plea, by each of the said defendants above pleaded, they find that the said building and lands in the plaintiff's declaration mentioned and described are liable in manner and form as the plaintiff hath therein complained; and, as to the issue joined on the third plea, by the defendant, George L. Mott above pleaded, they find that the lien claim of the said plaintiff in the plaintiff's declaration mentioned is paramount to the said mortgage of the said defendant, as the plaintiff hath therein complained:

And it appearing that the summons in this cause was not duly served upon the defendant, Thomas Romaine, but was duly served upon all the other defendants therein named:

It is, therefore, ordered that judgment final in favor of the said plaintiff, for the said sum of dollars, besides his costs of suit, to be taxed, be entered, but only to be made specially of the lands and building in the said declaration described: Unless, etc.

Rule entered, etc.

*This rule is drawn for the case, where the builder is not actually served with the summons within the jurisdiction, and files no plea, and does not otherwise appear; and the owner pleads, non assumpsit; and lands not liable; and the mortgagee pleads, separately, non assumpsit; lands not liable; and mortgage paramount.

23.—Judgment on verdict. § 24.

(The judgment record after setting out the pleadings, and thus stating the issues, and after reciting the award of the venire, etc., should proceed—)

And the jurors of the jury whereof mention is made come also, who to speak the truth of the matter within contained being chosen, tried, and sworn upon their oaths say (here state the verdict as particularly as may be needful; see Sec. 24, Note 6, and the last preceding form, No. 22, and after so stating the verdict, according to its legal effect, proceed—)

And it having been made to appear that the summons was duly served on all of the said defendants.[1]

Therefore it is considered that the said plaintiff do recover generally against the said defendant, Thomas Romaine, builder, and specially to be made of the lands and building

in the said declaration mentioned and described,[2] the sum of dollars, etc., for his damages (if the pleading be in debt, then vary the record accordingly) by the jurors aforesaid assessed, and also the sum of dollars, etc., for his said costs and charges by the court now here adjudged of increase to the said plaintiff and with his assent, which said damages, costs and charges, in the whole, amount to the sum of dollars, etc. And the said defendant, Thomas Romaine, in mercy.

And it is further considered and adjudged that the lien of the plaintiff upon the said lands and buildings, in the declaration mentioned and described, for the sum of dollars, etc., last above mentioned so as aforesaid adjudged to him, is prior and paramount to the lien of the said mortgage of the said defendant, George L. Mott, in the said declaration mentioned.

1. This recital is deemed to be important. See *Ennis v. Eden, etc. Co.*, 36 Vroom 577, 585.

2. If only a special judgment is awarded because of want of due service on the builder; or if the plaintiff chooses, as he may (see § 24, note 6), to take only a special judgment, this clause will read—Therefore it is considered that the said plaintiff do recover, but only to be made specially of the lands, etc., the sum of, etc. If the plaintiff, being entitled to enter judgment both generally and specially, means to enter the one and waive the other, such waiver may properly be recited in the record before the *ideo consideratum est* clause.

24. Form of execution (general and special). § 27.

Bergen County, *ss.*

(Seal.) The State of New Jersey to the Sheriff of the county of Bergen, greeting:

We command you that of the goods and chattels of Thomas Romaine, builder, in your county, you cause to be made the sum of dollars and cents (the total of the judgment for debt and costs) which Samuel Andreus, lately in our Circuit Court, held at Hackensack, in and for said county of Bergen, recovered against the said Thomas Romaine, builder, as well for his damages which he had sustained on occasion of the non-performance of certain promises and undertakings by the said Thomas Romaine, builder.

then lately made to the said Samuel Andreus, as for his costs and charges by him about his suit in that behalf expended, whereof the said Thomas Romaine, builder, is convicted as appears to us of record, and if sufficient goods and chattels of the said Thomas Romaine, builder, in your county, you cannot find whereof to make the damages aforesaid, then in that case we command you that you cause the whole or the residue, as the case may require, of the damages aforeseaid, to be made of the lands, tenements, hereditaments and real estate of the said Thomas Romaine in your county, whereof he was seized on the day of in the year (the date of the judgment) in whosesoever hands the same may be; and we especially command you, that in case you do not make the damages aforesaid, otherwise, that you make the whole or residue, as the case may require, of the damages aforesaid, of the following described lands, tenements and real estate of the said John Carpenter, owner, viz.: (describe the building and lands as in lien claim).

And have you those moneys before our Circuit Court aforesaid, at Hackensack, aforesaid, the day of next,[1] to render unto the said Samuel Andreus for his damages aforesaid; and have you then and there this writ.

Witness, Jonathan Dixon, Esq., Judge of our said Circuit Court, at Hackensack, aforesaid, the day of , in the year of our Lord, etc.

J. R. R., Clerk.

X. Y., Attorney.

1. See § 29 ante, note 2.

25.—Caveat against lien claim by owner or claimants.[1] § 29.

Bergen County Clerk's office.

Samuel Andreus, Claimant,
v.
Thomas Romaine, Builder,
John Carpenter, Owner.
} Lien Claim.

I, John Carpenter, owner (or we, A. B., C. D., etc., claimants owning together one-third of the lien claims, filed against the building in the above entitled lien claim men-

tioned) do hereby warn and notify all persons who may be concerned that we object to the said claim of the said Samuel Andreus in said lien claim set forth, and to any payment thereof, in whole or in part, until his said claim shall have been established by a special judgment thereon.

(Signatures of Caveators.)

1. There should be a separate caveat, filed in the county clerk's office, against each lien claim which it is desired to object to.

26.—Petition for distribution of proceeds of sale among concurrent claimants. § 29.

Bergen County Circuit Court.

Samuel Andreus, Claimant,[1] *v.* Thomas Romaine, Builder, John Carpenter, Owner, George L. Mott, Mortgagee.	On Contract on Lien Claim.

To His Honor, Jonathan Dixon, Judge of said Circuit Court:

Your petitioner, William Stiles, respectfully shows that, heretofore, to wit, on the day of, etc., the said Samuel Andreus recovered judgment, in the above entitled cause, on a lien claim filed by him in the Bergen County Clerk's office on the day of, etc., for the sum of dollars, etc., specially to be made of the lands and building hereinafter mentioned and described, as by the record of said judgment appears:

That thereupon an execution out of said court was issued in the words and figures following, viz.:

(Here set out the execution in full.)

That thereafter the said sheriff (naming him), duly sold the lands and buildings above mentioned, according to the command of said execution and in the manner prescribed by law, and that the proceeds of such sale, after deducting the cost and expense thereof, including the sheriff's fees, and amounting to the sum of dollars, were thereafter, to wit, on the day of, etc., by the sheriff, paid to the clerk of this court[2] to be distributed among the claimants entitled thereto: that your petitioner, on the day of, etc., filed his lien claim against the said land and

building, and against the said Thomas Romaine, as builder, and the said John Carpenter, as owner, for an indebtedness of dollars, etc., due to your petitioner from the said Thomas Romaine, for wages for work and labor done and performed, in the erecting and constructing the said building, by your petitioner, as a journeyman and laborer, and that thereafter, to wit, on the day of, etc., your petitioner, in a suit duly instituted to enforce his said lien claim, in said court, recovered judgment for the sum of dollars, etc., specially to be made of the said lands and building, as by the record thereof appears, which said lien claim and judgment of your petitioner are still respectively undischarged and unsatisfied:

That one Jacob Fisher, on the day of, etc., filed his lien claim against the said land and building, and against the said Thomas Romaine, as builder, and the said John Carpenter, as owner, for an indebtedness of dollars, etc., or some other sum alleged to be due to the said Jacob Fisher, and that thereafter, and within the time required by law, * suit was duly begun, said court, to enforce said claim which suit is still pending and undetermined:

That one Philip Rich, on the day of, etc., filed his lien claim, etc, (as in the last paragraph to the * and then proceed) a summons was issued, in a suit to enforce said lien claim, but the time of the issuance of such summons was not endorsed upon the said lien claim, within the time required by law, and that the said lien claim of the said Phillip Rich thereby became and was discharged:

(In the same manner, set out all other lien claims, and then proceed.)

That the said lien claim of your petitioner is entitled to preference over all the other lien claims above mentioned, and that your petitioner is entitled to be first paid therefor out of the said proceeds of sale (see § 6 ante):

That the said George L. Mott, as mortgagee, claims some lien upon the said proceeds of sale by virtue of a mortgage upon said lands and premises above mentioned and described, given to him by on the day of, etc., to secure dollars, etc., or some other sum; but your petitioner shows that any right, claim, or interest of the said George L. Mott, in the said proceeds, if any he has, is

subsequent and subject to the claims of your petitioner and of the said Samuel Andreus, but is prior to the claim of all the other lien claimants above mentioned.[3]

Your petitioner further shows that the lien claims above mentioned are the only claims which have been filed against the said land and building: and

Your petitioner, therefore prays that the said proceeds of sale may be distributed, by the order of this court, among said claims according to law and the rights of said several claimants, as above mentioned.[4]

X. Y. Z., Attorney.

State of New Jersey, }
County of Bergen, } *ss.:*

William Stiles, the above named petitioner, being duly sworn on his oath according to law deposes and says he has read the foregoing petition and that all the matters and the things therein alleged and set forth are true, as he is credibly informed and believes.

(Jurat.) (Signature.)

1. Entitle the petition in the cause wherein the execution was issued, under which sale was made.

2. If the sheriff refuses to pay the money into court he should be ruled to do so. See § 29, note 2. To obtain such a rule, neither pleading or proof is necessary. *Gifford v. McGuiness,* 53 Atl, 87.

3. Mortgagees and other encumbrancers, whose liens are prior to the lien claims are not interested parties, as the sale of the property cannot cut off their liens. The owner, and subsequent mortgagees, whose liens are cut off by the sale, are interested in the surplus proceeds, if there are any; and are entitled, under the statute, to litigate the validity, or the correctness of the various lien claims, which have not been established by special judgment; it would seem, therefore, that they are entitled to notice of this proceeding; and such would certainly be true in the case of a mortgagee whose encumbrance is subsequent to one lien claim but prior to another; as may be the fact if the mortgage is an advance money mortgage. For in such a case the mortgagee has an interest in regard to the way the proceeds are to be distributed among the lien claims, even although he admits them all to be valid and correct. When such a case arises, the court may be able to work out the problem of disposition which will be presented, for example,—

The proceeds of sale are.....$1,500
The lien claim A is for..... 500
The lien claim B is for..... 500
The mortgage is for..... 1,000

and is prior to lien claim B and subject to lien claim A. How are the moneys to be distributed. See *Hoag v. Sayre,* 6 Stew. 552; *Day v. Munson,* 14 Ohio St. 488; *Clement v. Kaighn,* 2 McCart. 47. In *Hoag v. Sayre,* Justice Dixon's dissenting view is the same as the view adopted in the Ohio case, although he does not cite it. It is said, in Law Notes, to be the better view.

Subsequent judgment, or other than mortgage, encumbrancers are clearly not entitled to notice, as the statute gives them no right to be heard upon the question of the validity, or correctness, of the lien claims; but they may, perhaps, apply to be admitted on the ground that the proceeds of sale will more than satisfy the other claims, and that they are entitled to share in the surplus.

4. It would seem to be good practice, upon presenting this petition to the judge, and having it marked as filed, to take a rule to show cause. Such a rule could contain a direction to take proofs, and, upon its return with such proofs and with due proof of its service upon the parties interested, an order could be made. If such a rule were made returnable on a day when the judge was actually attending at the circuit, with a stenographer present, there would seem to be no good reason why the proofs should not be heard by him orally at that time. Such a practice would, for many reasons, be advantageous.

27.—Rule to show cause on petition. § 29.

Bergen County Circuit Court.

Samuel Andreus, Claimant,
v.
Thomas Romaine, Builder,
John Carpenter, Owner,
George L. Mott, Mortgagee.
} On Contract on Lien Claim.

On reading and filing the petition of William Stiles, praying for the distribution of the proceeds of the sale on the execution issued on the judgment heretofore entered in this court in the above entitled cause, it is hereby ordered that Thomas Romaine, builder, John Carpenter, owner, George L. Mott, etc., (naming all the various claimants), and each of them, show cause before said court on the day of, etc., at the court house in Hackensack, at ten o'clock in the forenoon, why an order should not be made pursuant to the prayer of said petition:

And it is further ordered that the said parties, or either of them, may take proofs on days notice,[1] and that a copy of this rule be served upon each of the parties and persons above mentioned, by the said petitioner, at least days before the return day hereof.

Let the above rule be entered.

J. D., Judge.

On motion of
C. L. & K., Attorneys of Petr.
Rule entered this day of, etc.

1. In lieu of this direction to take proofs, the judge might direct that the parties produce their proofs orally before him on the return day.

28.—Order of distributton. § 29.

(Title as in last two forms.)

This matter coming on, on rule to show cause heretofore allowed upon the petition of William Stiles, and it being made to appear that the proceeds of the sale of the land and buildings, sold by virtue of the special writ of fieri facias issued in the above stated cause, after deducting the sheriff's fees, amounts to the sum of dollars, etc., and that said sum has been paid into court by the sheriff; and that the rights of the several persons entitled thereto are as follows, viz.:

The said William Stiles, for his said judgment, is first entitled to be paid the sum of dollars, etc., in full;

The said Samuel Andreus, for his said judgment, of dollars, etc.; the said Jacob Fisher, for his claim of dollars, etc.;

(and so as to the others in like case)

are entitled to share the residue of said proceeds, pro rata, between them; and no cause being shown or appearing to the contrary; it is ordered that the clerk of this court do first pay the said William Stiles (petitioner, his costs of the proceedings, to be taxed; that he next pay the said William Stiles the said sum of dollars, etc., due him on his judgment; and that he next distribute and pay the remainder of said proceeds pro rata among the said (naming the other claimants) according to the amount of their several judgments or claims as aforesaid; provided

that he shall in no case pay to any of said claimants his said share of said proceeds until after his lien claim shall have been filed for three months.

Rule entered this day of, etc., A. D. 1902.

On motion of

Attorney.

Let the above rule be entered in the minutes.

J. D., Judge.

29.—Form of receipt to discharge lien claim. § 31.

Bergen County Clerk's Office.

Samuel Andreus, Claimant,
v.
Thomas Romaine, Builder,
John Carpenter, Owner.
} Lien Claim.

I hereby acknowledge that I have received the sum of dollars, etc., in full payment and discharge of the above entitled lien claim by me heretofore filed.

Dated, etc.

SAMUEL ANDREUS (Seal).

I hereby certify that the foregoing receipt and discharge was executed, on the day it bears date, in my presence by the said Samuel Andreus, to whom I first made known the contents thereof, and who thereupon acknowledged that he signed and sealed the same as his voluntary act and deed.

In witness whereof, I have hereto set my hand the day and year aforesaid.

A. B., Master in Chancery of N. J.

30.—Affidavit to discharge lien claim. § 31.

Bergen County Clerk's Office.

(Copy, title and notice which have been served, see Form 14, and add)

State of New Jersey, }
County of Bergen, } *ss.:*

being duly sworn on his oath according to law says that on the day of,

etc., he served a notice signed by John Carpenter, the above named owner, and of which the foregoing is a true copy, on the said Thomas Romaine, the above named claimant, by giving the said notice to the said Thomas Romaine, personally in hand; and that, as appears upon the record, more than thirty days, since said service, have elapsed without such suit being commenced, or without any entry of the time of issuing such summons being made upon such lien claim.

(Jurat.) (Signature.)

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